

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC., APPELLANT,

vs.

THE NATIONAL CASH REGISTER COMPANY AND
THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO

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[fol. 1]

**IN THE DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF OHIO, WESTERN DIVI-
SION**

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

**THE NATIONAL CASH REGISTER COMPANY, JOHN H. PATTER-
SON, E. A. Deeds, G. C. Edgeter, W. F. Bippus, Robert
Patterson, J. A. Oswald, S. W. Davies, George G. Shaw,
E. H. Bunstine, H. G. Carnell, A. A. Thomas, Thomas
J. Watson, Joseph Rogers, Alexander Harned, F. S.
High, M. G. Keith, W. M. Cummings, J. C. Laird, Pliny
Eves, A. A. Wentz, George E. Morgan, C. T. Walmsley,
W. C. Howe, C. A. Snyder, Walter Cool, E. H. Epperson,
Myer N. Jacobs, and M. L. Lasley, Defendants**

FINAL DECREE—Filed February 1, 1916

This day come the parties, by their counsel, and there-
upon the defendants hereinafter named, consenting not to
oppose the entry of the following decree, as more fully
appears by their written consent on file herein, and the
plaintiff, through its counsel, having moved for an injunc-
tion, on consideration thereof the Court finds for the plain-
tiff and against said defendants, and that the plaintiff is
entitled to the relief prayed for in the following particulars:

It is therefore Ordered, Adjudged and Decreed:

First. That the defendants, The National Cash Register
Company, John H. Patterson, G. C. Edgeter, W. F. Bippus,
Robert Patterson, George G. Shaw, H. G. Carnell, Alex-
ander Harned, F. S. High, M. G. Keith, W. M. Cummings,
[fol. 2] J. C. Laird, Pliny Eves, C. T. Walmsley, C. A. Sny-
der, E. H. Epperson, Myer N. Jacobs, and M. L. Lasley,
have combined to restrain and have attempted to monopo-
lize interstate and foreign trade and commerce in cash
registers in violation of Sections 1 and 2 of the Anti-Trust
Act of July 2, 1890, by one or another of the means here-
inafter enjoined.

Second. That the defendant, The National Cash Register
Company, its directors, officers, agents and employees, and

the individual defendants, John H. Patterson, G. C. Edgeter, W. F. Bippus, Robert Patterson, George G. Shaw, H. G. Carnell, Alexander Harned, F. S. High, M. G. Keith, W. M. Cummings, J. C. Laird, Pliny Eves, C. T. Walmsley, C. A. Snyder, E. H. Epperson, Myer N. Jacobs, and M. L. Lasley, their employees, agents, and servants, and any other persons authorized to act or acting for or in behalf of any of them be and they are hereby jointly and severally enjoined and restrained as follows:

(a) From persuading or inducing, or attempting to persuade or induce, a purchaser of a cash register or other registering device manufactured or sold by any competitor, or a person who has agreed or contracted to become such purchaser, to break or repudiate his contract of purchase, or to return or refuse to receive the cash register or other registering device so bought or agreed to be bought, or to refuse to pay for the same in accordance with his agreement with said competitor.

(b) From espionage upon a competitor or his agent, or a solicitor of a competitor, or upon a retail dealer in the cash registers or other registering devices of a competitor, for the purpose of obtaining the names or addresses of purchasers or prospective purchasers from any such competitor or retail dealer, or for the purpose of obtaining any other information as to his private affairs or business; and from using any information so obtained in order to dissuade or endeavor to dissuade any person or persons from purchasing any cash register or other registering device manufactured or sold by a competitor.

(c) From inducing or attempting to induce, either directly or through another, any employee or ex-employee of any competitor, or of his agent, or dealer, to disclose to said defendants, or to either of them or to any person for them or for either of them the business secrets of his employer or former employer.

(d) From inducing, or attempting to induce, any employee or agent of a competitor, or any dealer in the cash registers or registering devices of a competitor, to leave [fol. 3] the service of such competitor or to cease to deal in such competitor's cash registers or other registering devices, and from employing or attempting to employ any such agent or employee so induced to leave the service

of a competitor, or any such dealer so induced to cease dealing in the cash registers or other registering devices of a competitor, as an agent or employee of the defendant corporation or any company organized as a successor to its business in whole or in part.

(e) From using any information as to the trade secrets or business confidences of any competitor which shall have been derived from any person who shall have been in the employ of any such competitor and which shall have been obtained by him in the course or by means of such employment.

(f) From manufacturing, selling or offering for sale any cash register or other registering device made to resemble in appearance a competing register or registering device, or producing, or designed to produce, the same or similar results, or performing, or designed to perform, the same or similar functions, when sold or offered for sale, not in good faith for the purpose of earning profits therefrom, but for the dominant purpose of preventing sales of such competing cash registers or registering devices, or of inducing the purchaser or owner of the competing cash register or registering device to substitute therefor one of such similar machines; or from selling any cash register or registering device at a price fixed with reference not to the cost of manufacture but solely with reference to the price of the said competing cash register or registering device, for the purpose of driving from business in interstate or foreign commerce the manufacturer of or dealer in such competing cash registers or other registering devices.

(g) From selling or otherwise disposing of any cash register or other registering device manufactured by a competitor, whether acquired by purchase, exchange or otherwise, not for the purpose of realizing therefrom as much as practicable but for the dominant purpose or intent of preventing sales by a competitor or retail dealer in the cash registers or registering devices of a competitor; and from acquiring any such cash register or other registering device, manufactured by any competitor, for any of the purposes specified in this subparagraph of this decree.

(h) From selling or otherwise disposing of any second-hand cash register or other registering device of the de-

fendant's own make for the purpose not of realizing therefrom as much as practicable but for the dominant purpose of underselling a competitor and driving him from business; Provided, that nothing herein contained shall prevent any sale or offer at a price made in good faith to meet competition.

(i) From employing any person, whether known as a "special man", or "competition man", hereby defined to be an employee, to have as his principal business not the promotion of the sale of the cash registers or other registering devices of the make of the defendants, or the solicitation of orders therefor, but the prevention of sales of cash registers or other registering devices by a competitor, or his agent, or dealer.

(j) From following from one city or village to another, or from one place in the same city or village to another place therein, any competitor, or his salesman, or agent, or any dealer in a competitive cash register or other registering device, for the purpose of interfering with or hindering such competitor, salesman, agent, employee or dealer, while attempting to sell any cash register or other registering device, or for the purpose of ascertaining the names of the persons upon whom, or the places of business at which, such competitor, salesman, agent, employee, or dealer, may call.

(k) From making, or circulating, or causing to be made or circulated, any statement, report, representation, or insinuation reflecting upon the solvency or responsibility, financially or otherwise, of any competitor, or upon the efficiency of any competing cash register or other registering device, when such statement, report, representation, or insinuation is either a misrepresentation or is made for the mere purpose, not of directly promoting the sale of registers or other registering devices manufactured by defendants, but of preventing the sale of competing cash registers or other registering devices, or of driving such competitor from business.

(l) From using or publishing, or causing to be used or published, any document, circular, or letter, the purpose or intent of which is to recommend or suggest to agents or employees of the defendants the doing of any act herein forbidden; and from in any manner communicating to such

agents or employees any means of accomplishing or bringing about any such act.

(m) From intimidating, or attempting or threatening to intimidate any competitor or any person contemplating becoming a competitor in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce by maintaining or making a display of models of machines of the defendants' make, together with various rival machines which they were built to resemble [fol. 5] or to displace, or by maintaining or making a display of quantities of second-hand registers or other registering devices of a competitor, or by displaying placards or statements purporting to show the amounts lost by various competitors in an effort to compete with the defendant corporation, or its predecessors, and from intimidating, or attempting or threatening to intimidate, by any such means, investors or persons contemplating becoming investors in the stocks or other securities of competing companies formed or to be formed.

(n) From maintaining as an ostensible competitor any corporation or organization owned, directed or controlled, by stock ownership or otherwise, by said defendants or any of them or affiliated with them, or any of them without disclosing the connection with the said defendants.

(o) From intimidating, or attempting or threatening to intimidate purchasers or prospective purchasers of competing cash registers or other registering devices, with suit or liability for patent infringement unless and until such claim of infringement has been sustained by a court of competent jurisdiction. But nothing herein contained shall prevent defendant corporation or its proper representative from serving in good faith upon any such purchaser a formal notice of its claim of infringement.

(p) From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce; Provided, that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney

General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right.

Third. That jurisdiction of this cause be and is hereby retained for the purpose of enforcing this decree, and for the purpose of enabling the parties to apply to the Court for modification hereof if it be hereafter shown to the satisfaction of the Court that by reason of changed conditions or changes in the statute law of the United States the provisions hereof have become inappropriate or inadequate to maintain competitive conditions in interstate or foreign [fol. 6] trade in cash registers or other registering devices in the United States, or have become unduly oppressive to the defendants and are no longer necessary to secure or maintain competitive conditions in such interstate and foreign trade.

Fourth. That defendants pay the costs of this suit to be taxed.

Fifth. That said petition be and it is hereby dismissed without prejudice as against the defendants S. W. Davies, E. H. Bunstine, A. A. Thomas and A. A. Wentz.

Hollister, Judge.

(February 1, 1916.)

[fol. 7] IN UNITED STATES DISTRICT COURT

In Equity. No. 6802

[Title omitted]

PETITION OF NATIONAL CASH REGISTER Co.—Filed Aug. 30, 1943

To The Honorable Judge of the District Court of the United States, Southern District of Ohio, Western Division:

The petition of The National Cash Register Company, a Maryland Corporation, respectfully shows and alleges as follows:

I. On February 1, 1916, there was entered in the above cause (in which The National Cash Register Company, an

Ohio Corporation, the predecessor in business of your petitioner, was one of the defendants), a final decree, which thereafter continuously has been, and now is, in full force and effect and applicable to your petitioner.

II. By Paragraph Second, subdivision (p) of said final decree, your petitioner, its directors, officers, agents and employees, are enjoined and restrained as follows:

"From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce; *Provided*, that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plants so desired to be [fol. 8] acquired will supplement the plant, patents, machines or facilities of the defendant's corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right."

III. On information and belief, your petitioner represents that the Allen-Wales Adding Machine Corporation (hereinafter referred to as "Allen-Wales") is a corporation organized and existing under the laws of the State of New Jersey having an authorized capital stock consisting of 10,000 shares of common stock without par value, all of which are issued and outstanding, and 10,000 shares of preferred stock of a par value of \$100 each, of which 5,000 shares are issued and outstanding (including 9 shares held in the Treasury of the Corporation). The said corporation has been and now is chiefly engaged in the business of manufacturing and selling adding machines. To a very limited extent, it has also manufactured and sold commercial bookkeeping or accounting machines and combination adding and cash-drawer machines. The machines manufactured by the said corporation are sold in both interstate and foreign commerce.

IV. Your petitioner represents that it has heretofore entered into a contract (which will be exhibited to this Honorable Court) with certain stockholders of Allen-Wales, whereby it has agreed to purchase all or not less than 95% of the outstanding common stock and all or not less than 50% of the outstanding preferred stock of Allen-Wales, subject to the approval of this Honorable Court.

V. The petitioner represents that there is not now and that there never has been any substantial competition between your petitioner and Allen-Wales, for the following [fol. 9] reasons:

1. The business of your petitioner (other than the production of war materiel in which it is now engaged) consists of (a) the manufacture and sale of cash registers, (b) the manufacture and sale of accounting machines, and (c) the manufacture and sale of accessories and supplies for such machines and the servicing of such machines. The petitioner and its predecessors have been in the cash register business for more than sixty years and have been in the accounting machine business for about twenty-five years. During the year 1942, petitioner converted its plant to war work, in which it is now engaged. For the year 1941, its sales of cash registers represented 72.66% of its total business and its sales of accounting machines 27.34%. Petitioner has never manufactured or sold adding machines, as such, although adding and subtracting mechanism is contained in many of the machines manufactured by the petitioner.

2. On information and belief, more than 94% of the business of Allen-Wales (other than the production of war materiel, in which it is now engaged) has consisted in the manufacture and sale of adding machines, although it has manufactured and sold, in very small quantities, two models of a combination adding and cash-drawer machine, which perform some functions similar to those of cash registers but lack the essential features of cash registers and, as a result, have never been in direct or substantial competition with cash registers manufactured and sold by petitioner. Allen-Wales has also manufactured and sold, in small quantities, two models of commercial bookkeeping machines which are similar, in some of their operations, to certain of the accounting machines manufactured by the petitioner;

but these machines, being in a much lower price range, have [fol. 10] never been in direct competition with any of the accounting machines manufactured and sold by petitioner.

3. There is no competition between adding machines, as such, and either cash registers or accounting machines.

(a) An adding machine is a device for the mechanical totaling, by addition or subtraction, with or without printing, of a series of figures.

(b) A cash register is a tamper-proof mechanical device which, by visual indication and the automatic printing of a receipt and a locked-in tape, both showing the total amount or amounts of a retail transaction, forces an accurate accounting for cash received and paid out of a controlled cash drawer. It may also provide additional information through separate automatic totals, by types of merchandise, types of sales, and by clerk. The function of a cash register, although it contains adding mechanism and prints totals of columns of figures, is primarily to protect the retail merchant's money and to furnish information which will enable him to prepare records needed to operate his business efficiently.

(c) An accounting machine is a device by which entries and extended balances are mechanically printed in one or more bookkeeping columns, on one or more forms, with or without typewritten description, and by which totals for various classifications are automatically accumulated, all in simultaneous operation. Accounting machines are used extensively by banks, manufacturing companies, insurance companies, department stores, etc., in their accounting departments, for handling accounts receivable, accounts payable, [fol. 11] general ledgers, payroll and cost accounting.

(d) The same customers who purchase and use cash registers and accounting machines frequently purchase adding machines and make use of them in conjunction with or supplemental to the other machines, particularly accounting machines.

VI. The petitioner represents that the acquisition of the capital stock of Allen-Wales by your petitioner will not have the effect of lessening competition in any measure.

On the contrary, such acquisition will tend to increase competition in the field of adding machines. Allen-Wales is one of the smaller corporations engaged in that business, its principal competitors transacting a much larger volume of business and having greater financial resources and much larger and better equipped selling organizations. The principal competitors of Allen-Wales in the adding machine field are also the strongest competitors of petitioner in the accounting machine field, among them being the Burroughs Adding Machine Company, the Underwood-Elliott Fisher Company and the Remington Rand Company. Those three corporations do more than 62% of the adding machine business in the United States, and Allen-Wales does about 8%. Your petitioner, with financial and manufacturing resources and a selling organization much larger than those of Allen-Wales, will be able to increase the production and sale of its line of adding machines and compete on more even terms with the present competitors of Allen-Wales in the adding machine field.

VII. In acquiring the stock of Allen-Wales there will be no acquisition of patents or patent rights by your petitioner which will tend to lessen competition. The basic patents have all expired. Allen-Wales owns seven patents and [fol. 12] seven patent applications, each of which relates only to details of construction, and all of which could easily be avoided in the design of a new adding machine. There are no patents owned or controlled by Allen-Wales under which your petitioner would not be willing to grant non-exclusive licenses to others, free of royalties. Allen-Wales has a non-exclusive license from an independent inventor, William S. Gubelman, for the manufacture and sale of adding machines, under certain patents owned or controlled by him; but petitioner is advised that the principal competitors of Allen-Wales in the adding machine field, including the three corporations hereinbefore mentioned, have similar licenses from Mr. Gubelman; and your petitioner already has a similar non-exclusive license under the same Gubelman patents for all its present and future products. Your petitioner has been informed that Allen-Wales owns or has an interest in one patent and six patent applications relating to mercury switches, a feature not essential to the building of adding machines and one which your petitioner does not consider of importance in connec-

tion with any of its products. Accordingly, your petitioner has made an agreement with Mr. W. J. Pickering, now President of Allen-Wales, that if your petitioner acquires the stock of Allen-Wales it will cause to be assigned to him all right, title and interest of Allen-Wales in these applications and the patents resulting therefrom, and all subsequent patent applications filed by any employee of Allen-Wales or the petitioner relating to a mercury switch and/or governor, for a nominal consideration, subject to a non-exclusive license to your petitioner under such patents.

[fol. 13] VIII. Your petitioner represents that it desires to acquire the said stock of Allen-Wales for the following reasons:

(a) To supplement the line of products of the petitioner, by adding thereto a line of adding machines, not now manufactured or sold by the petitioner. Other leading companies in the office equipment field make and sell both accounting machines and adding machines.

(b) To enable the petitioner to so supplement its line of products promptly after the cessation of hostilities through the acquisition of the present line of adding machines of Allen-Wales and the drawings, designs and machinery of Allen-Wales used in the manufacture thereof, without the necessity of the petitioner itself undertaking to design a line of adding machines and design and manufacture tools and machinery for the manufacture thereof, which preparatory work cannot be started while the petitioner is engaged almost exclusively in the production of war materiel for the Government of the United States and which would require more than two years after the cessation of hostilities before production could be commenced.

(c) Adding machines will be a new product in the petitioner's line of machines, and the addition of such new product will enable the petitioner, after the war, to utilize factory facilities developed in connection with its production of war materiel and will provide additional employment for men and women in the petitioner's factory in Dayton, Ohio, the number of whom has been greatly increased in carrying out petitioner's war program.

(d) Petitioner will be enabled to obtain the services of employees of Allen-Wales trained in the production of adding machines.

[fol. 14] (e) Petitioner has been obliged to train and develop a sales force in its accounting machines division separate from its cash register sales force, because of inherent differences in these two lines of business and in the type of customers to be approached. The adding machine business is more closely allied to the accounting machine business (although not competitive with it) than is the cash register business; and the addition of a line of adding machines to its products will enable the petitioner to make increased use of its accounting machine sales force, reduce its sales education expense and thus reduce the cost of distributing its products. It will also enable the petitioner to obtain increased coverage of the market in the accounting and adding machine field and thus increase the effectiveness of its sales organization.

(f) By adding a line of adding machines to its products, the petitioner will be enabled to increase the usefulness of its service and repair department and improve the mechanical servicing of its products.

Wherefore, your petitioner prays: that the acquisition by your petitioner of all or not less than 95% of the common stock and all or not less than 50% of the preferred stock of Allen-Wales Adding Machine Corporation be permitted and approved, on the ground that such acquisition will supplement the plant, patents, machines and facilities of the petitioner, and that such acquisition is desired for that purpose and will not substantially lessen competition.

And your petitioner, as in duty bound, will ever pray, etc.
Respectfully submitted, The National Cash Register
Company, by Ezra M. Kuhns, Secretary.

Joseph S. Graydon, Atty. for Petitioner, 1616 Union
Trust Bldg., Cincinnati, Ohio.

[fol. 15] *Duly sworn to by Ezra M. Kuhns, jurat omitted in printing.*

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

NOTICE OF PETITION—Filed September 24, 1943

To the Honorable the Attorney General of the United States,
Washington, D. C.:

Notice is hereby given that on this 30th day of August, 1943, The National Cash Register Company, a Maryland corporation, filed in the District Court of the United States, Southern District of Ohio, Western Division, in the case of the United States of America, Plaintiff vs. The National Cash Register Company, et al., Defendants, In Equity No. 6802, its petition praying for an Order of the Honorable Court, permitting the said Company to acquire all or not less than Ninety-five (95%) percent of the common stock and all or not less than Fifty (50%) percent of the preferred stock of the Allen-Wales Adding Machine Corporation, a New Jersey corporation.

The aforesaid notice grows out of the Second Paragraph, Subdivision (p) of the final Decree entered in the above entitled proceedings on February 1, 1916, by which not less than sixty days' notice to the Attorney General of applications herein referred to is required. A true and correct copy of said Petition under the Seal of the Clerk of the District Court of the United States, Southern District of Ohio, Western Division, is hereto annexed.

Joseph S. Graydon, Attorney for Petitioner.

August 30, 1943.

[fol. 17] Washington, D. C., September 2, 1943.

Receipt of the above notice with attached certified copy of Petition, filed August 30, 1943, is acknowledged.

—, Attorney General, by Elliott H. Moyer,
Special Assistant to the Attorney General.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

ANSWER OF THE UNITED STATES TO THE PETITION OF THE NATIONAL CASH REGISTER COMPANY FOR AN ORDER PERMITTING THE ACQUISITION OF STOCK OF THE ALLEN WALES ADDING MACHINE CORPORATION—Filed November 11, 1943

To the Honorable Judge of the District Court of the United States, Southern District of Ohio, Western Division:

The United States of America, by Wendell Berge, Assistant Attorney General, acting under the direction of the Attorney General, in answer to the petition of the National Cash Register Company filed in this Court and cause on August 30, 1943, respectfully alleges upon information and belief as follows:

1. The manufacture and sale of cash drawer and bookkeeping machines by the Allen Wales Adding Machine Corporation is a recent development by that company, that 1940 was the first year in which serious effort was made by the Allen Wales Adding Machine Corporation to market these products, that there has been and, after the war emergency, will be a wide potential market for such products, that the cash register and bookkeeping products of the National [fol. 19] Cash Register Company and the bookkeeping and cash drawer products of the Allen Wales Adding Machine Corporation have been and, after the war emergency, will be in direct and substantial competition, particularly in connection with sales to small business units and sales of low price bookkeeping and cash drawer machine lines. The public would be injured by the elimination of the Allen Wales cash drawer and bookkeeping machine line or by control over such Allen Wales products being vested in the National Cash Register Company, which has established products of its own in these fields.

2. The National Cash Register Company has planned to manufacture and sell adding machines and will manufacture and sell adding machines as soon as its production schedules and research facilities permit such manufacture and sale, even though the National Cash Register Company does not

acquire control over the Allen Wales Adding Machine Corporation. The potential competition in adding machines between the National Cash Register Company and the Allen Wales Adding Machine Corporation should be maintained. The elimination of such competition would be contrary to the letter and spirit of the Sherman Act (26 Stat. 209, as amended) and the Clayton Act (38 Stat. 730, as amended).

3. The acquisition by the National Cash Register Company of control over the Allen Wales Adding Machine Corporation would eliminate and substantially decrease competition in the distribution and servicing of both new and used adding machines, bookkeeping and accounting machines, cash drawer machines and business machines generally. The National Cash Register Company and each of the principal manufacturers of business machines control or operate their [fol. 20] own system of distribution for their own products and maintain complete control and discretion over prices, terms of sale, trade-in allowances, cost of servicing and repairs, distribution and cost of parts and all other activities related to distribution and require that practically all persons engaged in the distribution of their products sell only one such manufacturer's products exclusively. The Allen Wales Adding Machine Corporation distributes its products through approximately 250 independent business machine and office equipment dealers who do and may make their own determinations with respect to trade-in allowances, valuations and terms of sale for second-hand machines, prices for repairs, parts and services and other matters related to the distribution, servicing, and handling of business machines. The continued independent existence of the Allen Wales Adding Machine Corporation as a source of supply for independent dealers is essential to the maintenance of substantial competition in the distribution of adding machines, bookkeeping machines and other business machines both with respect to the products of the National Cash Register Company and the products of other manufacturers of business machines. Substantially 65 to 70 per cent of the sales of adding machines are made through distribution systems owned, controlled or operated by the major manufacturers of business machines and approximately one-third of the remaining production of adding machines which is all that is available for distribution by independent distributors of office equipment and business machines is produced by the

Allen Wales Adding Machine Corporation. The continued availability of Allen Wales products and parts to independent distributors is necessary for their continued existence and for the availability to them of a balanced and adequate line of business machines and of products and parts of established consumer acceptance. The continued existence of such independent distributors is necessary not only to maintain vigorous competition in the distribution [fol. 21] of adding machines, but to maintain outlets for new or expanding manufacturers of business machines who would be hindered in entering into, continuing, or expanding the production of business machines without the availability of independently operated distribution outlets.

4. The acquisition of control by the National Cash Register Company of the manufacture and sale of Allen Wales cash drawer machines, accounting machines and adding machines would have the same effects of eliminating competition and prospective competition as the practices charged under the heading "Preventing Prospective Competition" and "The Acquisition of the Business of Competing Companies," in the petition filed in this Court and cause on December 4, 1911, and would not be consistent with the purpose of the final decree entered in this Court and cause on February 1, 1916.

Wherefore, the United States respectfully requests that such petition be denied.

United States of America. By (S.) Wendell Berge,
Assistant Attorney General. (S.) Ernest S. Meyers,
(S.) Elliott H. Moyer, Special Assistants to
the Attorney General.

[fols. 22-22a] IN UNITED STATES DISTRICT COURT

(Title Omitted)

In Equity No. 6802

ORDER OVERRULING MOTION FOR LEAVE TO INTERVENE—Filed
November 16, 1943

This cause came on to be heard at the opening of the proceedings on November 15, 1943, on the motion of Allen Calculators, Inc. for leave to intervene and to file an answer

attached to said motion, copies of which motion and answer had been served on the United States Attorney General and the attorney for National Cash Register Company, and such motion was argued by counsel for the United States, The National Cash Register Company and movant, on consideration whereof the court overrules said motion; to which ruling Allen Calculators, Inc. excepts.

Chauncey B. Garver, Joseph S. Graydon, Attys for Nat'l Cash Register Co.; Elliott H. Moyer, Special Assistant to Attorney General; M. Seasongood, Frank R. Bruce, for Allen Calculators, Inc.

Druffel, J.

[fol. 23] IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants

FINDINGS AND ORDER—Filed December 7, 1943

Pursuant to the requirements of paragraph Second, subdivision (p) of the decree entered in this Court and cause on February 1, 1916, this cause came on to be heard upon the petition of the National Cash Register Company, a Maryland corporation, successor in business to the National Cash Register Company, an Ohio corporation, defendant in this cause, filed herein on the 30th day of August, 1943, said petition praying for authority for the National Cash Register Company, a Maryland corporation, to purchase all or not less than 95% of the outstanding common stock, and all or not less than 50% of the outstanding preferred stock of the Allen-Wales Adding Machine Corporation, a New Jersey Corporation, pursuant to a certain contract which the petitioner had entered into with certain stockholders of the Allen Wales Adding Machine Corporation, subject to the approval thereof by this Court. After con-

sideration of said petition, the answer thereto, the evidence, and arguments of counsel, the Court finds:

1. More than 94% of the business of the Allen-Wales Adding Machine Corporation (other than the production of war materiel) has consisted of the manufacture and sale of adding machines, and the Allen-Wales Adding Machine Corporation does approximately 8% of the adding machine business in the United States.

[fol. 24] 2. The petitioner, the National Cash Register Company, except for an insignificant number of its Class 3000 accounting machines which were converted to function as adding machines, has not engaged in the manufacture or sale of adding machines while its principal competitors in the production and sale of cash registers and accounting machines are engaged in the manufacture and sale of adding machines.

3. In 1941 the Allen-Wales Adding Machine Corporation manufactured and sold 257 commercial bookkeeping machines and such sales constituted $3\frac{7}{10}\%$ of the total dollar volume of the Allen-Wales Adding Machine Corporation.

4. In 1941 Allen-Wales Adding Machine Corporation manufactured and sold 327 units of its combination adding and cash drawer machine and such sales constituted approximately $2\frac{1}{10}\%$ of its dollar volume.

5. The competition between the accounting machines and cash registers of the National Cash Register Company and the accounting machines and combination adding and cash drawer machines of the Allen-Wales Adding Machine Corporation is not substantial.

6. The business machines manufactured by the National Cash Register Company are sold and distributed through its employees operating under rules, regulations, and instructions promulgated by the National Cash Register Company.

7. The business machines produced by the Allen-Wales Adding Machine Corporation are sold and distributed extensively through distributors who own and operate their own sales agencies, and through independent dealers who operate their own businesses, in the course of which they to a substantial degree make their own determinations as

to the policies and practices to be followed in the sale and distribution of business machines. The preservation of such distributors and independent dealers as competitors in the field of distribution of business machines is a matter of public interest.

[fol. 25] 8. The acquisition by the petitioner of the assets and business of the Allen-Wales Adding Machine Corporation through the purchase from certain stockholders thereof of all or part of its outstanding common stock and all or part of its outstanding preferred stock will supplement the plants, machines, and facilities of the petitioner; and such acquisition is desired by the petitioner for the purpose of supplementing its plants, machines, and facilities, and, upon compliance with the conditions set forth in said Section 9 hereof, such acquisition will not substantially lessen competition.

9. It is therefore ordered, adjudged, and decreed that the petitioner, the National Cash Register Company, a Maryland corporation, be, and it is hereby, authorized and permitted to acquire the assets and business of the said The Allen-Wales Adding Machine Corporation, a New Jersey corporation, through the purchase of all or part of its outstanding common stock and all or part of its outstanding preferred stock: Provided, however, that such acquisition shall bind the National Cash Register Company to the performance of the following conditions:

A. The operations of Allen-Wales Adding Machine Corporation shall be maintained as a separate division of the National Cash Register Company, or as a separate corporation, with a complete and independent accounting system until at least January 1, 1950.

B. All existing contracts between the Allen-Wales Adding Machine Corporation and dealers and distributors of its products shall be continued in full force and effect by National Cash Register Company at least until January 1, 1950; provided that any such contract may be terminated prior to January 1, 1950: (1) with the consent of the dealer or distributor who is a party thereto, or (2) in good faith and for good cause based on substantial breach of such contract by such dealer or distributor. No termination for cause of such

[fol. 26]

an existing contract shall be effective until the dealer or distributor involved has been given at least 30 days' notice of intention to terminate his distributorship or dealership contract, and each such notice shall include a statement of the cause relied upon for such termination.

Any such contract may be modified prior to January 1, 1950, with the consent of the dealer or distributor involved, provided, however, that any such contract may be modified or terminated prior to January 1, 1950, without the consent of the dealer or distributor involved if permitted by the terms thereof but only to the extent necessary to permit petitioner, through its regularly established agencies and representatives, to solicit sales, sell and service products of The Allen-Wales Adding Machine Corporation in territory now covered by any such contract without any obligation to pay to or share commissions or discounts with any such dealer or distributor resulting from any such soliciting, selling or servicing; and provided further that, upon any such termination, the dealer or distributor involved therein shall be offered a new contract identical with his existing contract except for the elimination therefrom of any exclusive or preferred rights in the territory covered thereby, as against such soliciting, selling and servicing by regularly established agencies and representatives of the petitioner, and such new contracts shall be subject to the provisions of this Order. Nothing in this Order shall be deemed to prejudice any right which any dealer or distributor has under any existing contract.

C. Parts for repairing or servicing the products of the Allen-Wales Adding Machine Corporation shall be [fol. 27] made available by the petitioner to the dealers and distributors of products of the Allen-Wales Adding Machine Corporation at least until January 1, 1954, for purchase or handling by such dealers and distributors.

D. The affairs of the Allen-Wales Adding Machine Corporation or the Allen-Wales Division of the National Cash Register Company, as the case may be, shall, during the periods that the provisions of this Order are operative, be conducted so as to exercise the utmost good faith in dealing with and in-making im-

provements and servicing information available to existing dealers and distributors of Allen-Wales products and in making Allen-Wales products, accessories, and parts available to such dealers and distributors.

E. The purpose and intent of these conditions is to assure to existing dealers and distributors of products, including adding machines, bookkeeping machines, and cash drawer machines and accessories therefor, manufactured by the Allen-Wales Adding Machine Corporation that such products will remain available to them for approximately a five-year period after the resumption of substantially normal production of business machines; and, in the event that such resumption does not occur prior to January 1, 1945, the United States of America may petition this Court for an extension of the date specified in subsections A and B above. In the event any such extension is granted, a corresponding extension shall be made in the date provided in subsection C above.

F. No unfair or unreasonable discrimination shall be practiced against the dealers and distributors of the Allen-Wales Adding Machine Corporation in connection with the prices, terms, conditions, and procedures upon which Allen-Wales products, parts, accessories, and servicing information are; pursuant to this Order, [fol. 28] made available to its existing dealers and distributors, and such prices, terms, conditions, and procedures shall not, directly or indirectly, unfairly or unreasonably discriminate against such dealers and distributors.

10. Jurisdiction over the matters contained in the petition and over the provisions and conditions of this Order is hereby retained for the purpose of enabling the Attorney General or the petitioner to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Order, for the modification thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof. Jurisdiction is also retained for the purpose of enabling any dealer or distributor of the Allen-Wales Adding Machine Corporation to apply to this Court

for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Order, or for the enforcement of compliance therewith, in relation to any matter in which such dealer or distributor has an interest.

11. For the purpose of securing compliance with this Order, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, be permitted (1) access during the office hours of the petitioner, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the petitioner, relating to any matters contained in this Order; (2) without restraint or interference from the petitioner, to interview officers or employees of the petitioner, or of the Allen-Wales Adding Machine Corporation, who may have counsel present, regarding any such matters; and (3) the petitioner, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Order, provided, however, that information obtained [fol. 29] by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, or in connection with securing compliance with this Order.

12. The terms and conditions of the final decree entered in this Court and cause on February 1, 1916, shall remain in full force and effect.

13. This order shall not be deemed to determine or adjudicate the validity of any patent owned by the petitioner or the Allen-Wales Adding Machine Corporation nor the legality or validity of any patent license agreement or arrangement to which the petitioner or the Allen-Wales Adding Machine Corporation may be a party.

14. The costs of this proceeding shall be taxed to the petitioner.

John H. Druffel, United States District Judge.

Approved as to form: Graydon, Head & Ritchey, Attorneys for Petitioner; Wendell Berge, Assistant to the Attorney General; Ernest S. Meyers, Elliott H. Moyer, Special Assistants to the Attorney General.

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

PETITION FOR APPEAL—Filed December 4, 1943

Allen Calculators, Inc., a corporation duly organized and existing under the laws of the State of New York, states that on November 16, 1943, its motion for leave to intervene herein and to file an answer was denied by order of this Court. Allen Calculators, Inc., conceiving itself aggrieved by the ruling of the Court in denying said motion for leave to intervene, hereby appeals from said order to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

The Petitioner presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

Murray Seasongood, Frank R. Bruce, Attorneys for
Petitioner.

Paxton & Seasongood, Scribner & Miller, of Counsel.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

ASSIGNMENT OF ERRORS—Filed December 4, 1943

Allen Calculators, Inc., having filed its petition for appeal herein, now states that as a result of the action taken on November 16, 1943, by this Court in denying Allen Calculators, Inc., leave to intervene in this cause, there is manifest error in said cause to the prejudice of Allen Calculators, Inc., in the following respects:

1. The Court committed material error against Allen Calculators, Inc., in overruling the motion of Allen Calculators, Inc., to intervene in the above entitled cause.

2. The Court committed material error against Allen Calculators, Inc., in withdrawing leave to Allen Calculators, Inc., to intervene conditionally, which leave the Court had theretofore granted.

3. The Court committed material error against Allen Calculators, Inc., in failing to enter an order or decree in conformity with its decision in refusing leave to intervene.

Wherefore, petitioner prays that said order denying it leave to intervene be reversed and set aside.

Murray Seasongood, Frank R. Bruce, Attorneys for
Petitioner.

Paxton & Seasongood, Scribner & Miller, of Counsel.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE
UNITED STATES—Filed December 10, 1943

This cause having come on this day before the Court on petition of Allen Calculators, Inc., filed with the Clerk of this Court December 4, 1943, praying for the allowance of an appeal to the Supreme Court of the United States from the order entered herein November 16, 1943, denying intervention to Allen Calculators, Inc., and requesting that a duly authenticated copy of the record of this cause be transmitted to the Supreme Court of the United States; and on the assignment of errors and jurisdictional statement showing the jurisdiction of the Supreme Court to entertain the appeal sought, similarly filed on December 4, 1943, with said petition for appeal; and on the supplemental jurisdictional statement similarly filed this date; the Court having heard and considered the same,—

It Is, Therefore, Ordered And Adjudged that Allen Calculators, Inc. be, and it is, hereby allowed an appeal to the Supreme Court of the United States from the order of this Court denying Allen Calculators, Inc. leave to intervene, that a duly authenticated copy of the record in this cause be transmitted to the Clerk of the Supreme Court, and that a citation be issued as provided by law.

It Is Further Ordered that petitioner give bond for costs on such appeal as required by law in the sum of \$1000.00.

[fol. 33] It Is Further Ordered that Allen Calculators, Inc., be, and it is hereby allowed a period of forty (40) days from the date hereof within which to file and docket said appeal in the Supreme Court of the United States. Nothing in this order contained shall be deemed or construed to stay or supersede in any way the Findings and Order entered herein on the 7th day of December, 1943. To all of which The National Cash Register Company, excepts.

Dated at Cincinnati, Ohio, this 10th day of December, 1943.

(S.) John H. Druffel, United States District Judge.

Have seen Graydon, Head & Ritchey, Attys for The National Cash Register Company; M. Seasongood, for Appellant.

Have seen J. P. O'Malley, Dept of Justice.

[fols. 34-35] Bond on appeal for \$1,000.00 approved and filed Dec. 10, 1943, omitted in printing.

[fols. 36-38] Citation in usual form showing service on appellees omitted in printing.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

In Equity No. 6802

PRAECIPE FOR APPEAL OF ALLEN CALCULATORS, INC.—Filed
December 14, 1943

To the Clerk:

Please make transcript for appeal of Allen Calculators, Inc. from order refusing it leave to intervene by including the following:

1. Copy of decree of February 1, 1916.
2. Petition of National Cash Register Company, accompanying notice of August 30, 1943, to the Attorney General of the United States and receipt of same by Special Assistant to the Attorney General dated September 2, 1943.

3. Answer of the United States filed November 11, 1943.
4. Stipulation in connection with trial between The National Cash Register Company and the United States.
5. Findings and order entered December 7, 1943.
6. Letter of Wendell Berge, Assistant Attorney General, to various Allen-Wales dealers referred to in IV of stipulation (4 above) and 3 sample replies.
7. Portions of official stenographer's transcript of proceedings relating to proposed intervention and entry of refusal of leave to intervene.
8. Notice by Allen Calculators, Inc. of motion to intervene.
9. Proposed intervening answer of Allen Calculators, Inc. dated November 15, 1943.
- [fol. 40] 10. Proposed entry permitting intervention.
11. Proposed entry containing ground of refusal of leave to intervene.
12. Entry of November 16, 1943, refusing permission to intervene.
13. Portion of transcript containing statement of Special Assistant to the Attorney General in argument to the effect "United States not in adversary position."
14. Petition for appeal.
15. Assignment of errors.
16. Jurisdictional statement.
17. Supplemental jurisdictional statement.
18. Order allowing appeal.
19. Bond on appeal and approval of same by judge (omitting power of attorney attached to original bond).
20. Citation.
21. Acknowledgment of service of citation by counsel for The National Cash Register Company and the United States of America.
22. Notice pursuant to Rule 12, par. 2, Rules of United States Supreme Court and acknowledgment of service of copies.

23. Proof of service of this praecipe (Rule 10, par. 2) and copies required to be served.

Murray Seasingood, Frank R. Bruce, Attorneys for Appellant, Allen Calculators, Inc.

Service of copy of above praecipe acknowledged this 14th day of December, 1943.

Graydon, Head & Ritchey, Attorneys for The National Cash Register Company.

J. R. O'Malley, Department of Justice.

[fol. 41] IN UNITED STATES DISTRICT COURT

In Equity No. 6802

[Title omitted]

SUPPLEMENTAL PRAECIPE OF THE NATIONAL CASH REGISTER COMPANY—Filed December 23, 1943

To the Clerk:

On behalf of The National Cash Register Company, please make supplemental transcript in connection with the appeal of Allen Calculators, Incorporated, by including the following:

1. Motion to Dismiss or Affirm by Appellee, The National Cash Register Company.

2. Statement on behalf of Appellee, The National Cash Register Company, Opposing Jurisdiction.

3. Proof of Service by The National Cash Register Company.

4. Portion of transcript of testimony containing opening statement of Mr. Joseph S. Graydon and Mr. Elliott H. Moyer (beginning at the 5th line on page 3 of the transcript and ending at the end of the 15th line on page 15 thereof).

5. Statement of Mr. Joseph S. Graydon regarding the theory of the United States (beginning at the third last line on page 22 of said transcript and ending at the end of the 18th line on page 23 thereof).

6. Transcript of testimony of R. C. Allen (beginning at the 15th line on page 102 and ending at the end of the 14th line on page 116, thereof).

7. Portion of transcript of testimony containing closing statement of Mr. Elliott H. Moyer (beginning at the 7th line on page 135 and ending at the end of the 23rd line on page 161 thereof).

(S.) Joseph S. Graydon, (S.) Chauncey B. Garver,
Attorneys for The National Cash Register Com-
pany.

Service of copy of above Supplemental Praecipe ac-
knowledgeed this 23 day of December 1943.

(S.) Murray Seasingood, (S.) Frank R. Bruce,
Attorneys for Allen Calculators, Inc. (S.) Calvin
Crawford, U. S. Attorney, Southern District of
Ohio, Western Division.

[fol. 42] IN THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants

EXCERPTS FROM STATEMENT OF EVIDENCE—Filed December
16, 1943

Before Honorable John H. Druffel, District Judge, at Cin-
cinnati, Ohio, on November 15 and 16, 1943

Appearances:

• For the Government: Elliott H. Moyer and Ernest S.
Meyers, Special Assistants to the Attorney General, De-
partment of Justice, Washington, D. C.

For the Defendant: Joseph S. Graydon and H. McD.
Ritchey, of Graydon, Head & Ritchey, Cincinnati, Ohio.

Chauncey B. Garver, of Shearman & Sterling, New York, N. Y.

For Proposed Intervenor, Allen Calculators, Inc.: Frank R. Bruce, of Scribner & Miller, New York, N. Y. Murray Seasongood, of Paxton & Seasongood, Cincinnati, Ohio.

[fol. 43]

Morning Session

Monday, November 15, 1943.

COLLOQUY BETWEEN COURT AND COUNSEL

Court met pursuant to adjournment. This cause coming on to be heard, and counsel being present as heretofore noted, the hearing proceeded as follows:

The Court: Does this take the original title of United States of America against National Cash Register Company?

Mr. Graydon: Yes.

The Court: All right.

Mr. Graydon: Your Honor, I would like to introduce Mr. Chauncey B. Garver, of Shearman & Sterling, of New York, of counsel for the National Cash Register Company, and Mr. Ernest Meyers and Mr. Elliott Moyer, of the Department of Justice.

Mr. Seasongood: May I introduce Mr. Frank R. Bruce, of the New York bar, of Scribner & Miller, attorney for Allen Calculators, Incorporated?

The Court: What is the name of your client?

Mr. Seasongood: Allen Calculators, Incorporated; and we have, your Honor, answer and application to intervene which we would like to file. We have given copies to both the Cash Register and the Government.

Mr. Graydon: We very strongly object. This is a suit between the United States and the National Cash Register Company. We have just seen this answer. There isn't anything that the United States can't raise and isn't prepared to raise, but we don't see where this company has any standing as a party to this suit.

Mr. Meyers: Your Honor, the Government has no objection to the Allen Calculators Company's application to intervene in this, because we feel that the federal rule is specifically [fol. 44] Rule 24(b)(2), which supports an application to intervene at this time.

The Court: It is at least accepted conditionally at this time, to save time.

Mr. Graydon: All right.

Mr. Seasongood: We have an order permitting it to be filed.

The Court: Conditionally filed at this time.

Mr. Graydon: Note objection and exception of The National Cash Register Company.

The Court: May I see what it is all about?

Mr. Seasongood (Handing a paper to the Court): I can tell your Honor very briefly.

The Court: I will tell you—what I think we should do is to have a tentative opening statement from counsel representing each side, and then you will have your turn. At this time I think a brief statement of what this is about, for the record, will be sufficient, and then I suppose when all the evidence is in counsel want to submit argument by way of brief. Is that agreeable?

Mr. Graydon: Yes, I think so.

Mr. Garver: Yes, your Honor.

Mr. Seasongood: Unless your Honor would hear oral argument also.

The Court: We set these two days aside for this case because of the lawyers from out of town. We have a jury case Wednesday. No doubt we will have no time for extended argument, and briefs will suffice. Let's start, then.

Mr. Graydon: * * * That is our case, if your Honor please. I haven't undertaken to try to state what the Government's case is. I think they can state it themselves. I have read it but I don't know that I understand it.

[fol. 45] The Court: Is the Government ready to make a statement at this time? Of course, you understand the limit. We just want your position at this time.

Mr. Moyer: May it please the Court, the position of the Government on the application of The National Cash Register Company is this: * * *

Mr. Seasongood: Your Honor, we represent Allen Calculators, whom your Honor has conditionally or tentatively allowed to intervene. They are an independent dealer, and it is thought that the position of the independent dealer can be well presented by them, and by Mr. Allen in particular. I may say they very much fear this acquisition will be destructive of Allen Calculators, if National Cash is allowed

to buy Allen-Wales that there will be a destruction of the business of Allen Calculators. I call your Honor's attention to sub-paragraph (p) of the decree, and particularly that the ~~NCR~~—or the Cash, for short—is forbidden to acquire the stock ownership, which is what they purpose doing, of any competitor engaged in the business of cash registers or other registering device. I don't think my friend mentioned those words.

Mr. Graydon: I did. I read the whole thing.

Mr. Seasongood: It escaped my attention, at least it wasn't emphasized. The word was always "cash registers." Anyway, Allen-Wales does manufacture a cash register and is in direct competition now with the National Cash Register Company. Our friends can call it a cash drawer or something else, but it is a "cash register or other registering device" because a cash register is something that registers cash.

The Court: We will not go into that Boston decree at this point, but he has emphasized eight points defining a register, and this has three.

Mr. Seasongood: It has the cash registering, your Honor, [fol. 46] which is the essential element of it. That is a cash register (indicating). Of course, he has taken the cash register off of the Allen-Wales, but ordinarily it is superimposed. I think it is a complete cash register, but it does not have some of the features the National has, namely, it doesn't have the indicator and doesn't have a receipt to the customer, but it does register the cash and, therefore, it is a cash register. They are asking to be allowed relief from this decree. They were found guilty and forbidden to do these things.

Mr. Graydon: We consented to a decree.

The Court: We are not ready for argument.

Mr. Seasongood: The decree speaks for itself.

Mr. Graydon: We were not found guilty.

Mr. Seasongood: We will cite a case in the Supreme Court of the United States where the identical thing was and they were found guilty and enjoined from doing these acts. That is the first point. The first point is that they are only to have relief if there is no substantial diminution of competition as the result of the purchase and if the plant desired will supplement the plant—I call your Honor's attention to that—of the defendant corporation.

Now, to the extent that Allen-Wales is engaged in the manufacture of accounting machines—as they say. book-keeping machines, the acquisition will not supplement the cash register because they already have full equipments and arrangements and are making these very accounting machines; therefore, under the terms of the decree this is not permissible, as it is not required to supplement the plant. And this is a purchase of stock and all the business goes with it—that is down towards the end of sub-paragraph (p), about six lines before the end of it, that it must supplement, and to the extent that the Cash has already these accounting machines it is not a supplement to their [fol. 47] plant to acquire other accounting machines, which goes with the purchase of the stock of the Allen-Wales.

Now, another thing, the method of doing business of the Allen-Wales is the same as the method of doing business of the Allen Calculators. Substantially their method of doing business is identical. They are in competition, and their business is done, your Honor, through the medium of dealers, that is, it is like automobiles, and the general method of dealer handling is familiar, of course, to your Honor. That is, Allen Calculators sells to its dealers on favorable terms, the products are theirs, and they sell them with their other merchandise. The business of Cash is based on the agent system. The Cash Register Company continues to own the cash register, takes security on it, and the dealer for the cash register is merely an agent of the Cash Register Company. The two businesses, or methods of business, are very different.

The Court: Would you tell me now while you are here just your theory of why you have a right to intervene here? It appears a little unusual. This is kind of a semi-government proceeding in which the Government, on behalf of everybody, is opposing the confirmation of this sale. I would like to know just your position, how you expect the right to intervene, because we are going to have to pass on that; that is going to be one of the first things we are going to have to pass on.

Mr. Seasongood: I think an intervention is proper where parties in interest would be affected by the decree, and in this case the Allen Calculators is an independent dealer having particular knowledge of the effect that this transaction would have upon the lessening of competition and the lessening of the interference with its own business. It

has especial aptitude for presenting the position of the independent dealer in this field. It represents one of the independent dealers, as has been said, and the Government has no objection at all, as has been stated, to the interven- [fol. 48] tion. So it is in subordination to the government position. But the Government I think feels, and we certainly feel that, being in the field and having an opportunity to know the thing well, that its position should be represented. That was allowed in the Swift case, if your Honor please.

The Court: Who were the parties in the Swift case?

Mr. Seasongood: The Government and the Swift Packing Company, and the Grocers' Association was permitted to intervene in the case.

The Court: Just a thought, you know. There are occasions when you have a right to intervene and file a brief, but here is a proceeding between two private parties and you are a competitor and of course you may not like it, but what I wanted to do is to get your views and then between tonight and tomorrow to have any authorities to support your position. Do you have any objection to the case proceeding today between the Government and The National Cash Register Company and you just sit by and then—

Mr. Seasongood: —I think this, your Honor—of course, we want to cross-examine, have the opportunity to cross-examine.

The Court: I will tell you—you see, you can advise with the Government and assist them in bringing out any points that you think will be helpful, but it just seems a little unusual in a matter between two private parties here, in which the Government intervenes, that you come in. I thought if you had some authorities—

Mr. Seasongood: —Of course, we will supply the authorities, but that is true of any intervention. Intervention is always where somebody who is not a party to the original suit asks to come in and is permitted to come in because [fol. 49] he has a special interest. We think we have a special interest, and it does seem to me that where the Government, who is the moving party, has no objection, that the person who is proceeded against is not the one to say whether they should be permitted to intervene if the Government has no objection, and they said they didn't.

Mr. Meyers: Will the Court hear me a few minutes?

The Court: I didn't mean to interrupt.

Mr. Seasongood: I had about finished. The only other observation I was going to make, your Honor, is, as I said before, the method of doing business. The National Cash Register Company does business under the agency system, and these two concerns do business under the dealer system, and it is thought the method of doing business under the agency system will destroy the dealer system of this intervenor.

The Court: All right. We will hear from the Government.

Mr. Meyers: Your Honor, I merely wanted to comment on the application for intervention, if you will hear me on it.

The Court: All right. It seems to me this is unusual.

Mr. Meyers: I think the unusual character of this application is due to the fact that this is a decree matter and not a case of first impression. However, under the rules of civil procedure it seems clear to me that the application should be granted where the applicant for intervention has a claim or defense in common, providing that certain procedural aspects of the application are taken care of, such as time, and that the intervention will not unduly prejudice or delay the rights of the parties involved. I think the application [fol. 50] in this case meets the two conditions. I think it meets the substantive condition. That is, the applicant having a claim or defense in common with that of the Government, I think it is to the interest of the applicant that he preserve whatever rights he may have in this litigation because of two situations: (1) There is a matter of private litigation going on between Allen-Wales and Allen Calculators. In that the Government has no interest, but I can see the applicant would like to preserve whatever rights he has in that litigation in this action. (2) He has a claim, in my judgment, in common with the Government, to see that the retail level of distribution is not wiped out, diminished, by the petitioner in this cause, because such elimination of competition at the retail level, in the Government's opinion, would eliminate competition on the manufacturing level. That is the last vestige of competition that is remaining among independent manufacturers. So we do believe that the applicant here has a meritorious application to present to the Court, if the Court wants it.

The Court: Does the Government concede that Allen-Wales is one of nine manufacturers manufacturing the same type of machine and, assuming that eventually, if the deal went through, it would be approved by the upper courts, wouldn't there be eight doing the same line of business?

Mr. Meyers: I would like to defer to my associate on that. He has the figures.

The Court: I just want to know whether that is the fact.

Mr. Seasongood: We deny that.

The Court: That is all I want to know. . . .

Mr. Garver: If your Honor please, may I hand up a stipulation which we are filing with the approval of the Government?

Mr. Seasongood: We would like to see that.

[fol. 51] Mr. Meyers: It admits certain allegations in the petition that we have agreed to.

Mr. Seasongood: Your Honor, we haven't had an opportunity to study this at all.

The Court: Of course, as I say here, you are in here co-operating with the Government. The Government has stipulated and for the sake of saving time we will be recessing in ten or fifteen minutes and you can see it.

Mr. Garver: Your Honor, that is why we object to this intervention.

The Court: We will go along. I think you have stated your position relative to the intervention.

Mr. Seasongood: Of course, our rights will be preserved as to everything that is offered that they have stipulated.

The Court: Without opening your mouth you have an exception to everything that takes place here.

The stipulation so offered is made part of this record, marked *Petitioner's Exhibit No. 1*.

Mr. Seasongood: Your Honor, may I make just one more suggestion as to our right to intervene?

Mr. Graydon: I don't think we want to hear this.

Mr. Seasongood: I think this would convince the Court—at least, I hope it would.

The Court: Is it going to take just a minute?

Mr. Seasongood: Just a minute, your Honor. Section 16 of the Clayton Act expressly authorizes any corporation to have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss

or damage by a violation of the anti-trust laws. If we would sue to enjoin this going through, the United States would have to intervene and we would have this all over again in another litigation, and it seems to me that makes [fol. 52] it clear we have the right to intervene.

Mr. Graydon: That may be clear, but the question is, who is running this case? Is this the Government's case or your case?

Mr. Seasongood: Any intervention has to be in subordination to the main person.

Mr. Graydon: If you think it is sufficiently subordinated, that is all right.

The Court: This is a proceeding to permit the purchase of this company by modification of the decree of this Court. We must not lose sight of that. I think later along we can consider the matter of intervention but, at any rate, the National Cash Register Company has a right to fully and completely put in their entire case to support what they are trying to do. Later on we can discuss whether or not they are within their rights.

By Mr. Garver:

Q. Mr. Allyn, do you know what other companies besides Allyn-Wales make adding machines?

A. There are at least eight other companies—I mean seven other companies.

Mr. Garver: It has been stipulated that the figures on this chart show the sales of adding machines in 1941 by the nine manufacturers. I would like to offer that in evidence.

The chart so offered in evidence, entitled "1941 Adding Machine Sales," is made part of this record as *Petitioner's Exhibit No. 18*.

Mr. Garver: This chart, your Honor, shows in 1941 the total sales of adding machines were \$31,822,000.

Mr. Seasongood: So far as this represents the R. C. Allen Company this is incorrect.

[fol. 53] The Court: It is correct?

Mr. Seasongood: It is incorrect. According to Mr. Allen, the figure is incorrect.

Mr. Graydon: Do you want to correct it?

Mr. Seasongood: Sure. I want to come in to see that it is corrected.

At this point a recess was taken until 2:00 o'clock in the afternoon of the same day, Monday, November 15, 1943.

Mr. Moyer: If your Honor please, at this time, in support of the stipulation, I would like to offer for the inspection of the Court a questionnaire that was sent out to a number of Allen-Wales distributors, and replies received from 22 dealers—that is all the replies we received to the questionnaire—stating the effects on their business and the competition at distribution level of the proposed acquisition. The stipulation provides that this is offered for inspection by the Court, and also that National's counsel can offer any comments on the communications that they desire to.

Mr. Garver: We reserve objection to those, on the ground of materiality and relevancy. We agreed that they could be put in and examined by the Court, but we do want to register an objection to them as being immaterial and irrelevant.

Mr. Moyer: I take it on the ground that you would object to any issue of competition at the distribution level being involved in the case, rather than to these particular documents.

Mr. Garver: Our position is, your Honor, that the only question before the Court is whether there is any substantial competition between the corporation which is making the purchase and the corporation which is being sold, and if the result of the acquisition would be to substantially lessen competition between those companies.

[fol. 54] The Court: Yes. I understand the Government's opposition is limited to that, that you are opposing just on that ground alone.

Mr. Moyer: We could state our position that way, although our position is based not only on the direct competition in the machines that are being manufactured and on the potential competition in connection with adding machines, but also the effect on competition at the distribution level. National has a distribution system that it owns and controls entirely. It determines every detail of that. Allen-Wales sells through independent distributors that can go out and offer special services, they can offer special deals on trade-ins, they can maintain a market for used machines. National Cash Register determines whether a used machine shall be junked or sold.

The Court: I know, but it is here for permission to proceed under this decree, and you see nowhere is there any sug-

gestion in the decree about this matter that you are talking about.

Mr. Moyer: Oh, the original complaint——

The Court: ——I understand, but we are talking about the decree.

Mr. Moyer: Provided it does not reduce competition.

Mr. Graydon: Between the buyer and seller.

Mr. Moyer: It does not say between buyer and seller in the decree, reading the term counsel is referring to, one provision in the Clayton Act. We are interpreting a decree which goes at least as far as Sections 1 and 2 of the Sherman Act as well as the Clayton Act, plus the provisions in the decree. If the decree merely incorporates the Clayton Act it does less than the antitrust laws would otherwise provide. We take it that the decree incorporates a future course of conduct to meet a pre-existing situation, and the provision of the decree, "and that the acquisition will not substantially lessen competition," that is not limited in its scope and, in any event, on a narrow interpretation on the scope of competition between these two companies certainly the distribution systems are an important element in the competition.

The Court: You make your record, you see. You are offering them subject to the objection that they are not relevant; is that your position?

Mr. Moyer: Yes.

Mr. Garver: If your Honor wishes to accept these letters in response to a letter written by the Attorney General we would like to submit for your inspection a memorandum which covers all these Allen-Wales dealers and distributors, and which has——

The Court: ——That can follow along in rebuttal.

Mr. Garver: We would like to submit it to your Honor.

Mr. Moyer: I have no objection to the material incorporated in this.

Mr. Graydon: As I understand, your Honor, the Department wrote letters to all the Allen-Wales agencies.

Mr. Moyer: Not all of them. We wrote to forty-three and I believe we have twenty-two replies.

Mr. Graydon: All right. They express a certain attitude. Now we have a complete investigation on our part of a great many more of those dealers, and we want the whole attitude before the Court.

Mr. Garver: This does not state the attitude. This isn't letters, but it is information from Dun and Bradstreet on their own letter-heads, as to what kind of business they do. A great many of them were in business years before they got Allen-Wales adding machines. In other words, the contention of the Department is that if these men cannot get Allen-Wales adding machines they will have to go out of business.

The Court: Well, I question the propriety of the letters, [fol. 56] and your position is not under oath, and I say I will receive it conditionally, just to enable you to make up the record, so if the Court of Appeals wants to have anything to do with it, it will be before them.

Mr. Graydon: We don't know whether the Court of Appeals has anything to do with it.

The Court: I don't either.

Mr. Moyer: This is covered by the stipulation. Under existing conditions we did not want to subpoena in forty or fifty dealers. The statements are before the Court under the stipulation, and any comment National wishes to make on them—

The Court: —For practical purposes let us let them in.

The folder referred to, containing photostatic copies of statements by dealers of Allen-Wales Adding Machine Corporation, is made part of this record as Government's Exhibit No. 105.

Mr. Garver: This memorandum, which is prepared by Allen-Wales Company, which we would like to submit with the letters, contains a list of all of their sales dealers and distributors. It gives the date when each started in business, it gives the date when they made a contract with Allen-Wales, and it contains information from their own letter-heads and from Dun and Bradstreet as to what business they are in.

The Court: Let the Government put theirs in.

Mr. Moyer: We are also offering communications received from each of the manufacturers of adding machines, giving an outline of the distribution systems.

The folder referred to, marked "Adding Machine Distribution Systems," is made part of this record as Government's Exhibit No. 106.

Mr. Moyer: If the Allen Calculators, Inc. status would permit them to put their Mr. Allen on and cross-examine him, I would defer to their examination at this time.

[fol. 57] The Court: Have you any other witnesses?

Mr. Moyer: We have no additional witnesses except Mr. Allen, unless Allen Calculators, Inc. is permitted to examine him first.

The Court: If Allen Calculators, Inc. is not permitted to intervene will you call him as your witness?

Mr. Moyer: What is the status of the intervenor at this time?

The Court: I would say that the intervention was received conditionally this morning, and I don't see anything that developed here. This is an original proceeding by the United States against the National Cash Register Company, and we are passing on the decree which grew out of the litigation at that time between those parties. I think it would be unreasonable at this time to—

Mr. Moyer: —I will call Mr. Allen.

Mr. Seasongood: I understand your Honor rules we are not permitted to intervene.

The Court: Yes. As I say, the original proceeding was between the United States Government and the National Cash Register Company, and we are just considering the decree growing out of that litigation, and it would be unreasonable at this late date to permit intervention by your client. So you may have an exception and take such other position as you would want to, and if you later want to file a brief as a friend of the Court I don't see that there is any objection to that.

Mr. Seasongood: Of course, we haven't had the right to cross-examine or any of the rights of a litigant in the case.

The Court: I understand, but occasionally the Court permits briefs to be filed without actually taking part in the case, but I think that is about as far as we can go.

[fol. 58] Thereupon, RALPH C. ALLEN, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Examined by Mr. Moyer:

Morning Session, Tuesday, November 16, 1943

Court met pursuant to adjournment. This matter coming on for further hearing, and counsel being present as heretofore noted, the hearing proceeded as follows:

Mr. Seasongood: Your Honor, I have an entry overruling the application to intervene, of which I have given copies to the Government and opposite counsel. It is satisfactory to the Government. I haven't heard from the other gentlemen.

Mr. Graydon: It is not satisfactory to us, your Honor, for the reason that your Honor will note that after providing that the Court overruled said motion to intervene it proceeds with this language: "upon the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered therein and the only parties involved in such controversy are the Government of the United States and the National Cash Register Company." It seems to me it is entirely unnecessary and improper for your Honor to state a particular reason for your action, in view of the fact that there might be several other good reasons. Among others, I might mention the fact that although counsel for the proposed intervenor was advised of this proceeding at least three weeks, and one of his associates consulted your Honor, they said nothing to us, and at the last moment come in with an intervention, after we had prepared to answer the rather simple answer of the Government, bring in eleven pages of matter that we never had a chance to look into. That would be a good and sufficient reason, in the discretion [fol. 59] of the Court, for refusing this belated attempt to intervene. And I would suggest that your Honor needs to give no reason after the words "overruled said motion to intervene, to which ruling Allen Calculators excepts." If your Honor states one reason they might claim that was not a good reason, and then you would not have the benefit of another.

Mr. Seasongood: If your Honor please, the reason your Honor gave for overruling the application should be stated. That is the reason that your Honor gave. If you want to go into these other matters, that matter was not adduced, was not objected to, there was no objection on that ground whatsoever. If there had been it would have been explained as to why what has been done was done, and that is that the Government did not file its answer until shortly before this hearing, and that it was impossible to present the matter any sooner. That matter was not argued and was not the basis of your Honor's decision.

The Court: I simply stated this was a proceeding between the Government and the National Cash Register Company.

Mr. Seasongood: That is right, and that is what we tried to state there. We are only embodying that there, and that was your Honor's basis for not permitting us to intervene.

Mr. Graydon: I don't know how you can say that the Court did not permit you to intervene on that ground only.

Mr. Seasongood: You can't at this stage make objections which you did not make when we presented the petition which the Court did not consider.

The Court: I think you can until the close of the case, and thereafter if it is important.

Mr. Graydon: He presented it and your Honor said tentatively you would take it. You were postponing it.

Mr. Seasongood: And then I called attention to Section 16 of the Clayton Act, which seemed to give us an indubitable right to intervene.

[fol. 60] Mr. Graydon: No—

Mr. Seasongood: —You express your opinion and it doesn't matter whether it is correct or not,—it is a correct decision. I think your Honor ought to accord us an entry which shows what took place. That is to say, it was presented, there was an objection to it that we had no standing in the case. And that is the position your Honor took, and we were refused the right to intervene and our rights have been lost. We were not permitted to cross-examine, we were not permitted to adduce evidence from the president of our own corporation, and, we think, to have assisted the Court by our participation. But that was denied us. I think the entry should show what took place, and not an afterthought of counsel as to something that might have been objected to, which the Court never heard, and never asked for any hearing. The Court decided it on that ground that is stated in the entry.

The Court: If you will let me read it just a moment. (After examining entry): Of course, the point about it is I wouldn't want this entry to go on because, as I say, I gave you an opportunity to furnish authorities. Of course, you suggest the Clayton Act, but I wouldn't want this matter here to turn on that one ground alone. You can prepare an entry overruling your petition to intervene, and that is all there is to it, because we did not go into the matter fully.

Mr. Seasongood: Your Honor precluded us from going into it by going ahead with the case and not letting us cross-examine. What would be the sense of our intervening this

morning, when the case is all over? We couldn't render the assistance to the Court which we had hoped to render.

Mr. Graydon: Your president was on the stand.

Mr. Seasongood: Well——

Mr. Graydon: You mean you could have done it better than the Government?

The Court: Are we ready for argument?

[fol. 61] Mr. Graydon: Yes.

Mr. Seasongood: Does your Honor refuse to enter it?

The Court: Yes.

Mr. Seasongood: What entry does your Honor want?

The Court: I want an entry that your petition to intervene is overruled.

Mr. Seasongood: Strike it out and fix it the way your Honor wants to, giving us our exception and objection.

The Court: I think that the record should show that the Court does not consider this entry fair, in that it has to be bound on that one ground without going into it fully (handing document to Mr. Seasongood).

Mr. Seasongood: Couldn't your Honor just fix it the way you think it should be, so we get through with it?

The Court (After examining the entry again the Court handed it to Mr. Seasongood).

Mr. Moyer: If the Court please, I have two additional Government exhibits that I don't believe there will be any objection to.

Mr. Seasongood: Does your Honor want me to have it rewritten, or do you want to strike it and sign it?

The Court: No. Miss Doyle will re-write it for you.

Mr. Seasongood: And, also, I think your Honor has the notice and the proposed answer. Could those be initialed or identified? Of course, we couldn't file them because we weren't a party—just so we can have that those were the ones that we did present to the Court. I don't want to attach them to the entry. I don't suppose that would be acceptable. (After the Court handed another document to Mr. Seasongood): Then I may hand those to the stenographer, for identification as to the notice, proposed answer and proposed order submitted to the Court.

The documents referred to were thereupon marked for the purpose of identification Proposed Intervenor's Exhibits A, B and C, respectively.

[fol. 62] Thereupon Mr. Graydon proceeded with his opening argument and at its Conclusion Mr. Moyer proceeded to answer. Before Mr. Moyer had concluded a short recess was taken, after which the following took place:

Mr. Seasongood: Your Honor, could we have this entry? I have given them copies and now it has been stricken out, "on the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered herein and the only parties involved in such controversy are the Government of the United States and said National Cash Register Company"—that is stricken out as your Honor directed and it is rewritten with those words out and copies furnished to counsel (handing entry to the Court).

[fol. 63] EXCERPT FROM ARGUMENT OF SPECIAL ASSISTANT,
MOYER, TO THE ATTORNEY GENERAL

Mr. Moyer: I am referring to the first portion of the paragraph* merely to lay the foundation for calling the Court's attention that this does not involve merely the scope of the Clayton Act or, for that matter, merely the scope of the Sherman Act or Section 5 or 6 of the Federal Trade Commission Act. This involves a general prohibition, with the exception I believe interpretable only in terms of the general prohibition. * * * Then there is an exception, an escape provision. And under what terms does it operate? It operates first upon the filing of a petition—that has been done—in which reasons have been stated, and then we come to an important condition of the escape clause, "and if the Court upon investigation into all the circumstances [fol. 64] of the case"—unlimited, as broad as the previous prohibition.

And I might interpolate here, your Honor, that I have not regarded this proceeding, and I don't believe proceedings under this decree are properly regarded as an adversary proceeding between the Government and the National Cash Register Company. Rather, the Court is charged under this

* Second (p) of decree of Feb. 1, 1916.

decree with determining the scope of the investigation and all the circumstances, and we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act. And I might say at this time that if the Court believes that we have been deficient in providing the Court a full picture of all the circumstances, if the investigation doesn't cover what the Court believes it is charged with doing upon its investigation, we will gladly undertake to supply any deficiencies with respect to presentation.

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[fol. 65] Reporter's Certificate to foregoing transcript omitted in printing.

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[fol. 66] PETITIONER'S EXHIBIT 1

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF OHIO, WESTERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants.

STIPULATION

For the purposes of the hearing on the petition of The National Cash Register Company, filed herein on August 30, 1943, for approval of the acquisition by it of all or not less than 95% of the common stock and all or not less than 50% of the preferred stock of Allen-Wales Adding Machine Corporation, under the final decree entered herein on February 1, 1916, it is stipulated between the attorneys for the United States and the attorneys for the said petitioner, The National Cash Register Company, as follows:

I. The following allegations in the said petition are admitted: Paragraphs I, II, III (omitting the words in the third sentence "To a very limited extent"), IV, sub-paragraph 1 of Paragraph V and sub-sub-paragraphs (a), (c) and (d) of sub-paragraph 3 of Paragraph V, and the third sentence in Paragraph VI.

II. The original of the contract referred to in Paragraph IV of the said petition will be produced at the hearing and a copy may be marked as an exhibit in evidence. The same applies to supplemental agreement between the same parties dated March —, 1943, and agreement between The National [fol. 67] Cash Register Company and W. J. Pickering, dated February 26, 1943.

III. The National Cash Register Company has submitted to the Attorney General two volumes of charts containing various statements, sales figures, descriptions of machines and illustrations thereof. The following matter in Volume One of the said charts is admitted to be correct:

(a) The summary figures in regard to the Allen-Wales Adding Machine Corporation, on page 7;

(b) The statement (page 8) that 94.2% of Allen-Wales 1941 sales were adding machines;

(c) Page 9 is an illustration of a typical model of Allen-Wales adding machine;

(d) The 1941 figures of sales of adding machines by various manufacturers, shown on page 10, are substantially correct.

(e) Page 12 shows illustrations of typical adding machines of nine manufacturers;

(f) The comparative figures shown on page 14 of various companies are substantially correct;

(g) The comparative figures shown on page 18 for 1941 sales of adding machines by National Cash Register Company and Allen-Wales are correct;

(h) The statements with respect to 1941 on page 19 are admitted, with the exception of the last paragraph;

(i) The comparative figures of 1941 accounting machine sales of National Cash Register Company and Allen-Wales, shown on page 22, are correct;

(j) The comparative figures shown on page 24 of 1941 sales of National cash registers and Allen-Wales combination adding and cash drawer machines are correct.

[fol. 68] IV. The Attorney General has written a form letter to certain of the present dealers and distributors of Allen-Wales adding machines and has received letters from some of them in reply. A copy of the said letter written by

the Attorney General, and the replies received thereto, may be presented to the Court at the hearing for its inspection. No objection thereto will be made by the petitioner on the ground of hearsay or incompetency; but the petitioner reserves the right to object to the same on the ground of irrelevancy and immateriality, and to comment on the value of such letters as evidence because of lack of opportunity for cross-examination, and in so far as they may contain expressions of opinion. The same shall apply to any letters written by the petitioner or by the Allen-Wales Adding Machine Corporation to Allen-Wales dealers and distributors and to any replies received thereto.

V. The decree may contain a provision that no approval has been asked in this proceeding of the validity of any patents owned by the petitioner or by the Allen-Wales Adding Machine Corporation or the legality or validity of any patent license agreements or arrangements to which the petitioner or the Allen-Wales Adding Machine Corporation may be a party.

VI. The Allen-Wales Adding Machine Corporation did not manufacture and sell any bookkeeping machines before 1938, and did not manufacture and sell any adding-cash drawer machines until 1940. Its sales of such machines [fol. 69] in subsequent years have been as follows:

<i>Bookkeeping machines:</i>	<i>Units</i>	<i>Dollar Value</i>
1938	2	\$825
1939	4	1,650
1940	87	33,228
1941	257	103,332
1942	191	75,356
<i>Adding-Cash Drawer machines:</i>		
1940	306	52,618
1941	327	56,640
1942	171	31,259

Ernest S. Meyers, Elliott H. Moyer, Attorneys for the United States. Joseph S. Graydon, Chauncey B. Garver, Attorneys for the Petitioner, The National Cash Register Company.

"A"

Dear Sir:

The final decree entered on February 1, 1916, in the Antitrust case entitled United States of America v. The National Cash Register Company, et al., among other things, enjoins the National Cash Register Company as follows:

From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce; Provided, that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plants so desired to be acquired will supplement the plant, patents, machines or facilities of the defendant's corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as might be right.

The National Cash Register Company has, in accordance with the above quoted paragraph of the 1916 decree, filed a petition with the United States District Court at Cincinnati, Ohio, requesting that the court grant permission to the National Cash Register Company to acquire stock of the Allen-Wales Adding Machine Corporation.

We are informed that you are a dealer or distributor of the products manufactured by the Allen-Wales Adding Machine Corporation and, in connection with the petition of the National Cash Register Company, we would appreciate a rather detailed statement from you as to the following:

(1) The extent to which you and the distributors of the products of the National Cash Register Company compete with respect to the sale and servicing of new and second-hand business machines.

(2) The probable effects upon your competitive position with respect to other distributors of business machines or office equipment, if you could no longer handle the products of the Allen-Wales Adding Machine Company.

(3) What would be the effect on your competitive position if Allen-Wales products were distributed exclusively through representatives of the National Cash Register Company?

(4) Would substitutes for the Allen-Wales line be readily available to you from other manufacturers? Answer separately for each type of Allen-Wales machine which you handle.

(5) Are Allen-Wales products or substitutes for such products essential to a business such as you are conducting? Why?

(6) What do you consider the future prospects for the sale of Allen-Wales commercial bookkeeping or accounting machines and the Allen-Wales combination adding and cash drawer machines? Why?

In furnishing the above information, it should of course be assumed that full production of business machines for general distribution will be resumed as soon as conditions permit.

Very truly yours

WENDELL BERGE
Assistant Attorney General

P. R. LYNCH TYPEWRITER CO.

1680 CHESTER AVENUE, BAKERSFIELD, CAL.

PHONE: 4445 Sept 22nd 1943

The Attorney General
Washington D.C.

Dear Sir:

E. H. K.
60-51-0

Ref: _____

#1

The National Cash Register Company are Competitors of
mine,,in Service and Sales-

#2

I would not be permitted to handle the Allen Wales products.

#3

To a certain extent, it would injure my business.

#4

Yes. Substitutes for most Allen Wales Modeld, are available.

#5

Yes. Adding machines make up one thrd of my business.

#6

The future for Allen ^Wales Adding machines for Bookkeeping,
and Cash Registers, is very good, for the reason the Allen Wales
is a high class product

Very truly


P. R. Lynch

The Attorney General
Washington D.C.

Dear Sir:

Ref; E H N.
60-51-0

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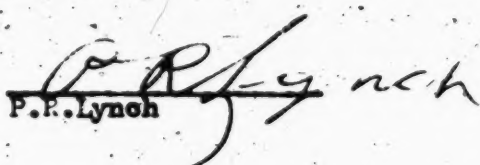
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#6

The future for Allen Wales Adding machines for Bookkeeping, and Cash Registers, is very good, for the reason the Allen Wales is a high class product.

Very truly


P.R. Lynch



60-51-0

RECEIVED

HEADQUARTERS FOR BUSINESS MACHINES

**SALES
SERVICE**

**SUPPLIES
ACCESSORIES**



October 15th, 1945.

BUSINESS EQUIPMENT COMPANY
316-318 S. Tryon St.
Phone 2-2905 Charlotte (1), N. C.

The Attorney General,
Department of Justice,
Washington, D.C.

Ref- E H M
60- 51- 0

Dear Sir:

Replying to yours of the 5th, regarding the National Cash Register Co., and The Allen Wales Adding Machine Corporation, we will reply by paragraph as follows:-

(1) To no extent of consequence, as we only service cash registers when a customer so request us to do so.

(2) The probable effect would be, that as we could not compete with other distributors, we would have to discontinue business, as the products of the Allen Wales Adding Machine Corp., has been our chief item of existence.

(3) Answer is the same as (2) above.

- (4) No: Hand operated adding and subtracting machines-
No: Electrically operated adding and subtracting machines,
No: Statement adding and subtracting machines,
No: Bookkeeping and Posting machines,
No: Duplex and Grand Total machines,
No: Registering Cash Drawer machines.

Similar machines of other makes are distributed through company offices in this territory.

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No: Electrically operated adding and subtracting machines,
No: Statement adding and subtracting machines,
No: Bookkeeping and Posting machines,
No: Duplex and Grand Total machines,
No: Registering Cash Drawer machines.

Similar machines of other makes are distributed through company offices in this territory.

(5) Yes: Because we have our small organization trained only on this line of machines.

(6) Good: Because there seems to be a growing demand for better featured machines, as the Allen Wales Corp., will have to offer. We speak only for this section.

Very truly yours,

BUSINESS EQUIPMENT CO.,

W. W. Harris
W. W. Harris, Partner.

ALLEN WALES ADDING MACHINES
SALES AND SERVICE *7m 1-*

September 28, 1943

n. Mass.

The Attorney General
Department of Justice
Washington, D.C.

Ref: E.H.M. - 60-51-0

Dear Sir:

I am answering questions asked me in your letter of Sept. 15th as follows. Nothing in these replies is said because of animosity toward either Allen Wales Adding Machine Corporation or National Cash Register Company - but simply to state that I am being eliminated from a business I have built, and have no reason to do other than state so plainly.

1. Competition between our products in this district is small. Our accounting machine line, while holding considerable promise, was not sufficiently developed as to features, etc., to be real competition. We have sold a number of cash drawer combinations but I should say only two or three per cent of our sales in the last year before restriction were made in competition with National Cash Register Products.

2. I would have no competitive position. I have handled Allen Wales in Boston for sixteen years and have no sidelines whatsoever, partly because Allen Wales has frowned on them, partly because it has taken all my time to do the job right. I have given twenty-three years to Allen Wales and Wales exclusively. With the Allen Wales line, I am naturally a strong competitor in this territory. Without it, I have nothing to compete.

3. I would lose everything I have worked for, and the National Cash Register Company, for a time at least, would inherit the fruits of my labor in building up accounts and confidence in Allen Wales, besides money I have invested both in salesmen and in a competent service force. I would simply have no competitive position.

I am answering questions asked me in your letter of Sept. 15th as follows. Nothing in these replies is said because of animosity toward either Allen Wales Adding Machine Corporation or National Cash Register Company - but simply to state that I am being eliminated from a business I have built, and have no reason to do other than state so plainly.

1. Competition between our products in this district is small. Our accounting machine line, while holding considerable promise, was not sufficiently developed as to features, etc., to be real competition. We have sold a number of cash drawer combinations but I should say only two or three per cent of our sales in the last year before restriction were made in competition with National Cash Register Products.

2. I would have no competitive position. I have handled Allen Wales in Boston for sixteen years and have no sidelines whatsoever, partly because Allen Wales has frowned on them, partly because it has taken all my time to do the job right. I have given twenty-three years to Allen Wales and Wales exclusively. With the Allen Wales line, I am naturally a strong competitor in this territory. Without it, I have nothing to compete.

3. I would lose everything I have worked for, and the National Cash Register Company, for a time at least, would inherit the fruits of my labor in building up accounts and confidence in Allen Wales, besides money I have invested both in salesmen and in a competent service force. I would simply have no competitive position.

4. Our adding machines which constitute 95% of our business. I could not get a substitute which would hold 10% of my business. Adding machine business calls for features not available on any substitute to hundreds of customers using special machines, such as fractions, automatic counts (leather and textiles) grand totals in banks and other places. Moreover, I have a high grade list of customers including about 150 banks which could not be sold anything even possibly available. On Cash Drawer combinations, there is nothing I know of. On bookkeeping line, nothing available.

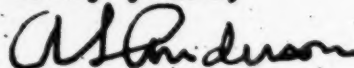
The Attorney General

September 28, 1943

5. Allen Wales or substitutes are essential as Allen Wales sales and service are my entire business. I have an office and service department on which considerable money has been spent, and thousands of dollars and sixteen years of hard work have been spent in building a reputation for Allen Wales. I have no way of even keeping the service, as National Cash Register Company would not sell me parts even if my customers wanted to stay with me. If I tried to stay in business, the National Cash Register Company would soon eliminate me. Allen Wales has always claimed I own my own business. Now it is being sold without my being able to do anything about it and the Company is being paid not only for its factory, tools, etc., but for my business..

6. If Allen Wales does, when conditions allow, anywhere near what it has spoken of doing on its accounting machine line, it would certainly have great possibilities. It's chief lack at present is in automatic features which I have been told would come. I believe much of the work on these has been done. With thousands of Allen Wales adding machines in use in Boston, the accounting machine will sell if it can do the job. My customers have confidence in our products.

Very truly yours,



A. L. Anderson

AIA-K

[fol. 76] ~~PROPOSED INTERVENOR'S EXHIBIT "A" (IDEN)~~
B.M.C.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff

v.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants

SIRS:

Please Take Notice that upon the annexed proposed answer of Allen Calculators, Inc., duly verified on November 15, 1943, and upon all the proceedings heretofore had in this cause, we shall move this Court at a term thereof to be held at the Federal Building, in the City of Cincinnati, County of Hamilton, in the Southern District of Ohio, for an order permitting Allen Calculators, Inc. to intervene herein upon the ground that the intervenor is engaged in commerce between the states and with foreign nations in adding machines; bookkeeping machines, calculators and cash register combinations, and that the proposed acquisition by National Cash Register Company of the stock in Allen Wales Adding Machine Corporation will materially and unreasonably restrain interstate and international commerce in such articles of commerce and will tend to create a monopoly in National Cash Register Company in respect of such articles of commerce;

And at the same time and place Allen Calculators, Inc. will move for such other and further relief as may be just [fol. 77] and equitable in the premises.

Yours, etc. Paxton & Seasongood, Solicitors for Allen Calculators, Inc., Petitioner for Intervention. Murray Seasongood, Esq., Frank R. Bruce, Esq., Of Counsel.

[fol. 78] ~~PROPOSED INTERVENOR'S EXHIBIT "B" (IDEN)~~
~~B.M.C.~~

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

~~THE UNITED STATES OF AMERICA, Plaintiff,~~

~~v.~~

~~THE NATIONAL CASH REGISTER COMPANY, et al., Defendants~~

~~ANSWER OF ALLEN CALCULATORS, INC.~~

To the Honorable the Judges of the District Court of the
United States in and for the Southern District of Ohio,
Western Division:

Allen Calculators, Inc., answering the petition of the
National Cash Register Company filed in this Court and
cause on August 30, 1943, respectfully alleges as follows:

1. Allen Calculators, Inc. is, and for over ten years
past has been, a corporation duly organized and existing
under the laws of the State of New York. It has its manu-
facturing plant in Grand Rapids, Michigan; where it is en-
gaged in the production of articles for interstate and inter-
national commerce, to wit:

- (a) adding machines,
- (b) bookkeeping machines and statement machines,
- (c) calculators,
- (d) cash register combinations.

[fol. 79] 2. Throughout said period of time Allen Calcu-
lators, Inc. has been engaged in commerce in respect of said
articles between the several states of the United States and
with foreign nations, and particularly has been engaged in
such commerce between the state of Michigan and the state of
Ohio and the Southern District, Western Division thereof.

3. The basic principles underlying the cash register, the
adding machine and the other articles of commerce enumer-
ated above are substantially the same and are based upon

devices whereby mathematical sums may be automatically added or otherwise dealt with by devices which record and print the totals or sums of such mathematical formulae. In its simplest form, a cash register is nothing more than an adding machine, plus a cash drawer and a mechanical device for indicating for the customer's view the amounts recorded on the machine. In recent years, there has developed a trend whereby the recording for the customer's view of the sum total of the purchases is not required, which makes a less expensive and less cumbersome machine. There is thus a degree of interchangeability between the cash registers and counting machines, so that the mechanical concept and the engineering required for the two types of machine are measurably interchangeable; and the two types of machine are allied in their field or, in the broader concept, are merely branches of the same field.

4. Your petitioner respectfully submits that, as appears from the petition of the National Cash Register Company itself, the manufacturing facilities and personnel of the cash register business is adequate to manufacture adding machines; and the mechanical skill in developing one or the other type of mechanical counting machines is substantially the same whether the machine is called a cash register or an [fol. 80] adding machine. Thus, no reason is shown in the petition of the National Cash Register Company why the National Cash Register Company should not develop its own line of adding machines or similar machines if it wishes to develop that phase of the counting machine business.

5. The material thing which the National Cash Register Company seeks to acquire through the acquisition of Allen Wales Adding Machine Corporation is to draw to itself the interstate business and good-will developed by Allen Wales Adding Machine Corporation as an independent competitor and thus eliminate that company from the competitive field. It is not necessary to recite the steps whereby National Cash Register Company acquired its preponderance in its field. It is significant, however, that when in the past National Cash Register Company has acquired a competing unit, it has absorbed the manufacture of its products into its integrated unit. The result of such integration was: Whereas a normal decree in a monopoly case is that the monopoly be dissolved into its constituent elements so as to create

a condition in harmony with law, yet no such decree was possible in the case of National Cash Register Company because all of its constituent elements had been integrated into a single plant. Thus, where there has been no decree of dissolution to restore competitive conditions, it is highly essential that the independents be permitted to develop without interference or control, until by their independent growth true competitive conditions in harmony with law shall have been restored; but, on the contrary, National Cash Register Company still exercises predominant control in its field.

It is noteworthy that National Cash Register Company proposes with respect to the Allen Wales Adding Machine Corporation to withdraw its manufacturing plant from Ithaca, New York, and integrate it into its plant in Dayton, Ohio, thereby disturbing the relationship of some four hundred employees in the Ithaca plant and disturbing the course of commerce of its products from New York to other states and nations.

6. It is respectfully submitted that the petition of National Cash Register Company in its final analysis means only this: that competition in the field has developed an article in trade which National Cash Register Company would like to own and, therefore, National claims the right to buy it and make it part of National's existing predominant control in the industry. If this view were accepted, the effect of the decree herein of February 1, 1916 would be neutralized.

7. Allen Calculators, Inc. has developed four divisions, more or less, known as the R. C. Allen line, namely:

- a—Adding Machines low priced for mass consumption
- b—Bookkeeping and Statement Machines
- c—Calculators
- d—Cash Register combinations.

With the exception of a few large cities, namely New York, Chicago, Philadelphia, Boston, Washington and Cleveland, the sale of the above lines is and has been, since the Company started in business eleven years ago, always from the dealer organization, who are better known as "Storekeepers." That is, they pay their own rent, buy and sell mer-

chandise of all kinds in the office equipment world, and treat the R. C. Allen line as one of their potential money-makers. They buy at an established discount rate. About 90% of the business of Allen Calculators, Inc. has and does come from dealers. The Allen Wales Adding Machine Corporation competes with substantially the same lines of articles and in substantially the same manner, marketing its products in interstate and foreign commerce largely through independent dealers.

[fol. 82] 8. The following companies sell their products through a directly controlled agency commission basis, namely Burroughs, Sunstrand (Underwood, Elliott-Fisher), Monroe and Remington-Rand. (It is believed that the Remington is marketed in some part through independent dealers and the balance through their own sales organization.) These four large companies secure approximately 70% of all business. The independent concerns are as follows:

Allen Calculators, Inc., Allen-Wales, Victor, Corona, Barrett.

9. This entire group of independents all sell adding machines in the low price bracket and market to a certain extent a combination adding machine register device that is quite popular although it differs from the more expensive cash register marketed by National and Burroughs in that it does not indicate to the purchaser the amount of the purchase nor give the purchaser a receipt therefor. Within the independent companies, Allen Calculators, Inc., has developed during the past few years by far the greatest volume of this combination adding cash register.

10. Allen Wales Adding Machine Corporation has also developed a combination cash register unit and no doubt has sold a reasonable quantity. However, Corona, a subsidiary of L. C. Smith Typewriters, Inc., has been selling for the past ten years a combination cash register unit and has been quite successful. Victor disposed of their right to sell a combination register to another concern called McCaskey, and they, as an independent company, purchased the mechanism of Victor and developed a very comprehensive line of combination cash register units, which company has distributed many thousands through inde-

pendent dealers. The least important independent of the [fol. 83] combination cash register units is the Barrett, a subsidiary of the Lanston Monotype Co. of Philadelphia. They have sold only a small number, but to some extent have been successful.

11. Thus, the picture of the combined total sales of all independents will show that each year the so-called adding machine-cash drawer combination units have mounted to a total in excess of 12,000 per annum. This, of course, is business not secured by National Cash Register Company, but if they purchase the Allen-Wales machine, they will be a formidable competitor against all independents, who will have reason to fear their competition.

12. In the cash register field, National Cash Register Company has a great preponderance, with some competition developed in recent years by Burroughs Adding Machine Company and with some competition from the cash drawer machine, as above indicated. Since the decree of February, 1916, one formidable competitor in the cash register field arose, namely, Remington cash register, which was backed by a group controlling almost unlimited capital. During this period, the competition was bitter and the Remington people found that they could not win out against the strongly entrenched sales position of National Cash Register Company, which had agencies and offices in all important centers, with each office having its own corps of local salesmen. As a result, the Remington people sold out to the National Cash Register Company and that name was taken off the market.

[fol. 84] 13. Until recent years National Cash Register Company did not invade the adding machine field, nor did the Burroughs Company invade the cash register field. In about 1929, National Cash Register Company purchased control of the Ellis Adding-Typewriting Company and was thus in possession of a substantial line of machines which contained the features of adding machines and billing machines. The name of this machine was then changed to National-Ellis and later to National. Thereafter, Burroughs started to develop its own cash register, which has been marketed under the name of Burroughs.

14. The situation as to the channels of distribution is this: National has its own complete distributing system, with machines billed to the distributor, and distributors are, in substance, agents of the Company, working on a commission basis. Machines are sent to these agents practically on consignment, so they need not be paid for until actual sales are made. This system pervades the country. On exactly parallel lines, the Burroughs Company has its system for distribution.

15. The independent dealers are a group of local merchants dealing mainly in office equipment, office supplies and specialties, who handle all types of office equipment, including typewriters, mimeograph machines, cash registers, adding machines, bookkeeping machines, billing machines, and the ordinary supplies incidental thereto. They may also handle office furniture. These are independent dealers, that is, each one does business on his own, with his own capital, good-will and credit, and makes purchases from the manufacturer under the usual terms of discount [fol. 85] and credit. Such dealers will, as a rule, handle one make of machine by direct dealing with the manufacturer thereof, but will handle all types of rebuilt machines, whether made by the independents or by the large manufacturers; and, in fact, the rebuilding of older machines is quite a profitable part of their business.

16. It would be disastrous to the whole independent field if either the National Cash Register Company or the Burroughs Adding Machine Company would be permitted to invade the field of the independent dealer, which was built up by the independent manufacturer and is the sole outlet for competitive goods. To permit such invasion of the independent field would completely engross the markets, and would leave no possibility of competition because no independent manufacturer could build up his own distributing system nor could any such distributing system be built up except after years of effort. In like manner, the independent dealer has built up his business through independent effort over a period of years, and it would be highly dangerous to him if the two large companies (National and Burroughs) invaded the field with their terms of sales and other restrictions upon independent dealing, so that the dealer would become, in substance, the agency of one or

the other of the two large manufacturers and would lose his status as an independent dealer who buys and sells whatever the market affords and whatever is desired by his local customers.

17. To permit the National Cash Register Company to keep the name of Allen Wales and to market it through the independent dealer, just as was done when the company [fol. 86] was truly independent, would, in substance, be turning the Allen-Wales machine into a "fighting brand" or a "knocker brand", because National Cash Register Company, being the owner of the Allen-Wales business and patents would be able to market the identical machine under its own name through its own sales organization and at a price commensurate with the higher prices charged for its other products and at the same time keep the Allen-Wales with the independent dealer at a lower price, which might be made still lower in order to get the custom controlled by the existing independent dealers. In this way, National Cash Register Company could control this type of machine, both through national distribution and through local distribution and thus effectively increase the control which National Cash Register Company already has in allied fields.

18. The National could swamp the independent market with its enormous manufacturing capacity, its mass production, its great amount of working capital, and the very considerable margin between its cost and selling price. It could place upon the dealers' shelves practically on a consignment basis unlimited quantities of Allen-Wales goods which the dealer would not have to pay for until the machines are sold. It could, by lowering the price or increasing the dealers' discount, make it impossible for the independent manufacturer to compete; while at the same time it would keep up the price of its products when sold through its own sales organization.

19. At present, there is fair competition for the dealer trade; but if National were admitted to the dealer trade, in [fol. 87] dependent competition would be hopeless and National would capture the dealer field.

20. To permit National to market under the Allen-Wales name would work a particular hardship upon Allen Cal-

culators, Inc. It was the same "Allen" who was in both Allen-Wales and in Allen Calculators, Inc. If National Cash Register Company should publicize the Allen-Wales name, the trade would get the impression that Mr. Allen had sold out to National and Allen Calculators, Inc., would lose the value of the name and good-will which Mr. Allen built up over many years of intensive effort in the adding machine and calculator field. It should be noted that Mr. Allen still claims an interest in the Allen-Wales company through litigation which is now pending.

21. It would be dangerous to permit National Cash Register Company to buy Allen Wales Adding Machine Corporation, under any conditions. If the National Cash Register Company should market through the independent dealers the result would be, as shown above, that they could swamp the markets and drive all independent manufacturers from the field. If, on the contrary, they marketed the Allen-Wales line through their own sales organization, it would close one of the important sources of supply which keep alive those particular independent dealers handling the Allen-Wales line. If the National Cash Register Company should market both through their own sales organization and also through the independent dealers, obviously, this would be such an engrossment of the field as to destroy the possibility of fair competition.

[fol. 88] 22. In addition to its answer to the petition of National Cash Register Company in its entirety as above set forth, Allen Calculators, Inc., denies the following allegations in said petition:

Allegations in paragraphs III and subparagraph 2 of paragraph V which allege that Allen Wales Adding Machine Corporation has manufactured and sold commercial bookkeeping or accounting machines and combination adding and cash drawer machines to "a very limited extent" and that such machines are not directly competitive with the cash registers and accounting machines of National Cash Register Company; the allegation of paragraph V of said petition which alleges "that there is not now and that there never has been any substantial competition between your petitioner and Allen Wales"; and the allegation of paragraph VI of said petition which al-

leges "that the acquisition of the capital stock of Allen Wales by your petitioner will not have the effect of lessening competition in any measure".

Wherefore, Allen Calculators, Inc., respectfully requests that the petition of the National Cash Register Company filed herein on August 30, 1943 be denied.

Dated: Cincinnati, Ohio, November 15, 1943.

Allen Calculators, Inc., by Murray Seasongood, Paxton & Seasongood, Solicitors. Murray Seasongood, Esq., Frank R. Bruce, Esq., of Counsel.

[fol. 89] STATE OF OHIO,
County of Hamilton, ss:

Ralph C. Allen, being duly sworn, says:

I am President of Allen Calculators, Inc., the answering intervenor aforesaid. The foregoing answer is true, as I verily believe.

Ralph C. Allen.

Sworn to before me this 15th day of November, 1943.
Evans L. DeCamp, Notary Public. My commission expires Sept. 11, 1944. Hamilton County, Ohio. (Seal.)

[fol. 90] PROPOSED INTERVENOR'S EXHIBIT "C" (IDEN.)
B.M.C.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802—Order

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THE NATIONAL CASH REGISTER COMPANY, ET AL.,
Defendants.

Allen Calculators, Inc., having moved this court for an order permitting it to intervene herein, and copies of the notice of motion and proposed answer of said intervenor having been served on the Attorney General of the United States and upon Joseph S. Graydon, Esq., attorney for

National Cash Register Company, and such application having been duly heard,

Ordered that said Allen Calculators, Inc., be permitted to intervene in this cause and that the answer of said intervenor to the petition of National Cash Register Company be filed.

[fol. 91] IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

In Equity No. 6802

THE UNITED STATES OF AMERICA, Plaintiff,

v.

THE NATIONAL CASH REGISTER COMPANY, ET AL.,
Defendants.

EXCERPTS FROM STATEMENT OF EVIDENCE—Filed December
30, 1943

Before Honorable John H. Druffel, District Judge, at Cincinnati, Ohio, on November 15 and 16, 1943.

[fol. 92] Morning Session—Monday, November 15, 1943

OPENING STATEMENT FOR PETITIONER

Mr. Graydon: If the Court please, this is an old case running back to sometime around 1911; United States of America, Plaintiff, vs. The National Cash Register Company, Defendant. In that case a consent decree was entered in the year 1916 enjoining the National Cash Register Company, the predecessor of the present company, and its officers at the time, from continuing certain practices alleged in the petition to have been in violation of the Sherman Law. The Clayton Act had not as yet been enacted when the suit was filed, although it was effective when the decree was entered.

Paragraph Second, Subdivision (p), of that decree is the one under which we come here. It provided that the company and its officials, the defendants, should be enjoined

“from acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise,

of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce: Provided that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right."

I may say to your Honor that upon two former occasions since 1916 applications similar to this were presented and heard and orders passed authorizing The National Cash Register Company to purchase property and assets, one under which, in 1929 upon a hearing and opinion by Judge Hickenlooper under circumstances very similar to this case, petitioner acquired the stock and assets of the Ellis Adding-Typewriter Company. I will refer your Honor to [fol. 93] that particular precedent because I think it is very close to the case your Honor has before him now. Then there was another occasion in 1931 when Judge Hough passed on a similar application and authorized the purchase by an opinion delivered orally at the close of the testimony.

The present petition is for leave to acquire all or not less than 95% of the outstanding common stock and all or not less than 50% of the outstanding preferred stock of the Allen-Wales Adding Machine Corporation, a New Jersey corporation engaged chiefly in the business of manufacturing and selling adding machines and, to a limited extent, bookkeeping or accounting machines and combination adding and cash drawer machines. I may say, your Honor, that is one of the machines referred to, that one right in the corner (indicating). You see, there is an adding machine and then it may be placed on a cash drawer.

Then the petitioner shows that a contract has already been made between these parties, which we will exhibit to

the Court, and it is to become effective upon approval by the Court and the issuance of an appropriate order.

I may say all of the National Cash Register Company's plants and business are now turned over to war work, except it does a certain amount of servicing and dealing in second-hand machines; but prior to its present war work its business consisted of (1) the manufacture and sale of cash registers comprising 76.2% of the business—I am referring now to the year 1941, the last year in which the normal functions of that plant and others continued, and (2) the manufacture and sale of accounting machines, which comprised 27.34% of its business. And they made no adding machines.

Now, Allen-Wales is a comparatively small company. Its total assets in 1941 were some \$1,600,000, and its gross sales \$2,900,000. It was just in the middle of nine companies in [fol. 94] the country manufacturing adding machines. We will have a chart that will visibly indicate these figures to your Honor, but I may say now that the companies called the Burroughs, Underwood Elliott Fisher, Remington Rand, and Victors were the four top leaders in the adding machine field and they accounted for 74.8% of the sales of adding machines in 1941, Allen-Wales accounted for 8%, and 17.2% was divided among four companies smaller than Allen-Wales, that is, R. C. Allen, who attempts to intervene now, Monroe, Corona and Barrett. I think it may bring home to your Honor immediately that 94.2% of the total business of Allen-Wales in adding machines in no possible sense could be considered competitive with any product of the National Cash Register Company. That is, the simple adding machine, hand or electrically operated, nobody contends, and the Government does not contend, that that 94.2% is competitive in any sense with the product of the National Cash Register Company. Allen-Wales furnished very little competition in the sale of adding machines as against Burroughs, Underwood and Remington Rand. Those are big, powerful companies, well integrated, nationwide market coverage. For example, in 1941, the sales of Burroughs products were in excess of \$41,000,000, Underwood \$36,000,000, Remington Rand \$49,000,000, whereas Allen-Wales was \$2,900,000.

It is proposed that the National Cash Register Company acquire these adding machines of Allen-Wales. The Na-

tional Cash Register Company is a company that would furnish real competition to Burroughs, Remington Rand and Underwood. The sales of National Cash Register products, exclusive of war work, in 1941 were in excess of \$48,000,000, so that the acquisition of the Allen-Wales Adding machine by National Cash Register Company will promote competition for the benefit of the public by substituting a strong, integrated company with a national [fol. 95] spread for the comparatively weak Allen-Wales.

Another provision in the decree indicating circumstances in which the company should be permitted to purchase other companies was if the purchase would tend to supplement the line of The National Cash Register Company. And that was one of the grounds on which Judge Hickenlooper held that he would authorize the purchase of the Ellis.

It is clearly within the scope of the decree that Allen-Wales, if acquired by National Cash Register Company, will supplement the patents, machines or facilities of defendant corporation. The present products of NCR are only cash registers and accounting machines. Other large companies furnishing office equipment make and sell accounting machines and adding machines. National Cash Register Company desires to enter into that line. Essentially a line of adding machines is a supplement to a company making and marketing accounting machines. Many companies using cash registers and accounting machines also use adding machines. Banks and others using accounting machines for bank work, utility companies using accounting machines and Ellis machines for distributing, also use adding machines, to be further dealt with by the accounting machines. For example, a large department store records its sales on cash registers. All charge tickets are sent to the office and listed on adding machines and the lists are then incorporated into the customers' bills on accounting machines. So these three machines will constitute an integrated trinity of use and are commonly recognized as such in the trade generally. So much for that. That is the supplementing.

And we will show your Honor accurate definitions, partly stipulated, which will be set forth on charts, and also that there is no question of the acquisition of any patent rights in this case.

Now that, if it please your Honor, seems to present—

The Court: Will you amplify last remark about the patents?

[fol. 96] Mr. Graydon: There is no element of acquisition of patents or patent rights involved, and no issue is made on this point in the answer.

The Court: You mean that there are no patents on the Allen-Wales machines?

Mr. Garver: Your Honor, the patents that the Allen-Wales Company owns are not fundamental, as all fundamental patents have expired.

The Court: That is all I wanted to know.

Mr. Garver: We will be glad to give anybody a free license, a non-exclusive license, under any patents.

The Court: That is all I wanted to know.

Mr. Graydon: No fundamental ones, as I understand. Your Honor, that seems to me to state our case in substance, but your Honor will note that I have dealt now only with 94.2% and I therefore wish to anticipate and indicate what we understand the Government's position to be. Briefly, I think it is that in the difference of 5.8% there are some slight elements which are not really of any present competition but by nature of an order may be—peculiar types of machines to which I am about to refer—more of a possibility of future competition. We claim that there is no present substantial competition and that, therefore, the elimination of any competition, if there should be any, will not substantially lessen competition. The 5.8% in 1941 is comprised of two classes. Allen-Wales made a commercial bookkeeping machine, of a very simple type, of which it sold only 257 units for a total of \$100,000, and that comprised 3.7% of its product. That commercial bookkeeping machine is simply an adding machine with a few accounting features added, and the total of those features was restricted to two—your Honor will see one of those; it is a very simple device—whereas the National Cash Register accounting machines have as many as thirty features. We have these enormous bank billing or public utility bookkeeping machines and the prices are as high as \$3,700. In 1941 the National Cash Register Company sold 4893 of these bookkeeping machines from \$550 up to \$3,700, whereas Allen-Wales sold only 257 of these adding machines with bookkeeping attachment, none for over \$450, and there is

no price competition whatever. So we suggest that that 3.7% supposed competition, if that is what the Government is aiming at, is infinitesimal and no real competition, no substantial competition.

The Court: Does the record show whether or not there are any basic patents owned by Allen-Wales covering this 3.7%?

Mr. Graydon: No, there are no basic patents.

The Court: I think the record ought to show that.

Mr. Garver: That is correct.

Mr. Graydon: That is correct, your Honor. That accounts for all the 100% of Allen-Wales in 1941 except 2.1%. In addition to 94.2% of adding machines and 3.7% of these small commercial bookkeeping machines Allen-Wales also has made and sold an adding machine with a cash drawer 00 that (indicating). Their sales totaled 327 units for a total of \$56,000, and they mention further that the acquisition of the Allen-Wales adding machine with a cash drawer would not take that product off the market because there are five or six others that make. It is not the elimination of any real competition. I want to point out to your Honor that an adding machine with a cash drawer on it is in no sense a cash register. The fundamental function of a cash register, the function recognized as fundamental in the patent suits in the Supreme Court of the United States, between the National Cash Register Company and the Boston Cash Register Company, back in the '90s, 156 U. S., pointed out that the fundamental thing about a cash register was that when a purchase was made the money was put in, [fol. 98] the price was shown to purchaser on an indicator, and by a simultaneous operation he visually saw the price, he received a receipt for that amount printed at the same time, and as a third operation the same transaction was printed on a locked-in tape which could not be tampered with. Now, the simplest form of a cash register has eight requirements: (1) the indication; (2) the receipt; (3) the detailed strip locked in; (4) what we call the transaction counter, which is a slip on which something of the nature of the transaction in addition to the amount, charge or cash, may be shown; (5) a locked-in total; (6) a printed total; (7) a single locked control so that only one person can open it; and (8) what is called a reset counter. Those eight qualities are required as essential by the National Cash

Register Company to constitute a cash register, and all of those qualities. This combined adding and cash drawer machine of Allen-Wales has only three. It has no indication; it lacks the protection which is the fundamental reason for a cash register, protection of the owner of the store against peculations, protection of the clerk against temptation, and the protection of the customer to know there is no incentive to overcharge him. The Allen-Wales adding machine with a cash drawer has no indicator and has no receipt. It has a detailed strip locked in and it has a lock-in total and it has a printed total—that is all.

In 1941 the National Cash Register Company sold 69,000 cash registers, including 16,500 at prices from \$150 to \$249. Allen-Wales, with its adding machine-cash drawer competed only in price with this class, selling 320 machines, and seven single machines in a slightly higher price bracket. So there is really no price competition between this combination of Allen-Wales and the simplest and cheapest cash register. So that in that year, as against 69,000 cash registers sold by the National Cash Register Company, Allen-Wales sold 327 in the low-price bracket, less than one-half of one percent. So we say the competition between Allen-[fol. 99] Wales bookkeeping machines and National accounting machines is purely an illusion both in respect to features and price. This will be shown not only by charts to be offered in evidence but also by such demonstration on a particular machine that your Honor may care to have.

Let me be fair to the extent of imagining the possibility of some slight competition. A small merchant whose selling day is over, if his cash register is cleared, can do adding on a cash register. He can do some adding. He can't do it while it is functioning as a cash register. And of course a large store would not think of doing adding on a cash register. Technically he could, but it is entirely an impractical and unbusinesslike way of carrying on a business. There are also instances where an adding machine with a cash drawer attached might be imagined as a substitute, although a very inadequate substitute, for a cash register. That would be where a merchant, say a man and his family, trusting each other, don't care about having to protect themselves against peculations of a clerk, they don't care about a thing that makes the cash register a cash drawer.

A man runs a shop and has no clerk. Maybe his customers trust him and they don't care about seeing the price he charges them or don't care about a receipt; he could use an adding machine with a cash drawer as something better than his own book of entry; it would get him some totals. But as a practical matter we can't conceive of any real competition between adding machines and cash registers.

Now, before closing, as I believe that states the substance of our case, I would like to call your Honor's attention to the fact that we shall attach to our brief a copy of the opinion of Judge Hickenlooper in the Ellis machine purchase. And just let me read to your Honor a few lines of what he said.

The Court: I don't think we are interested in that at this particular time. You can make it part of the record. We just want the statements now.

[fol. 100] Mr. Graydon: Very well. That is our case, if your Honor please. I haven't undertaken to try to state what the Government's case is. I think they can state it themselves. I have read it but I don't know that I understand it.

The Court: Is the Government ready to make a statement at this time? Of course, you understand the limit. We just want your position at this time.

OPENING STATEMENT FOR GOVERNMENT

Mr. Moyer: May it please the Court, the position of the Government on the application of The National Cash Register Company is this: The National Cash Register Company we believe intends to go into the manufacture of adding machines. It has the facilities to do so, and the purpose of the decree would be better served by their entering through their own manufacturing facilities rather than through the elimination of the largest distributor through independent dealers that there is in the market. It is true that 94.2% of the Allen Wales production in 1941 was adding machines and that they were one of the smaller companies in the field, but the larger companies represent companies similar to The National Cash Register Company, which distributes solely through their own owned and controlled outlets, with some exceptions; at least, Allen-Wales represents approximately 30% of the available adding machine supplies for independent office equipment, dealers and

business machine operators. The maintenance of competition at that level through independent dealers we believe is vital, and to eliminate that would substantially lessen competition in the industry.

We further take the position that Allen-Wales, in its manufacture of cash drawer machines and accounting machines, has merely begun the manufacture. They started in 1940, actually. The figure—I believe it was 257 accounting machines represents the first year in which they were offering that to any general extent. The same is true of the cash drawer machines.

[fol. 101] Now, irrespective of the definitions that The National Cash Register Company may adopt as a matter of salesmanship with respect to their cash registers, it seems clear to us that with respect to many types of business the cash drawer machine and the cash registers are in competition. The retail store or the service station or the beauty shop is going to buy either a cash register or a cash drawer machine, and whether they want the additional features or not becomes a matter of salesmanship. Since Allen-Wales is just entering into the two additional fields, and since Allen-Wales represents an essential source of supply for independent dealers in office equipment, we feel that the petition should be denied.

The Court: Will you try to limit and narrow the issues to just what you really are objecting to? I mean are there two types of machines that you claimed that The National Cash Register Company are at present in competition with Allen-Wales, just two types of machines?

Mr. Moyer: There are three.

The Court: What I would like you to do is to just specifically state what your objections go to.

Mr. Moyer: Present competition, as counsel for The National Cash Register Company has stated, involves a very small percentage of Allen-Wales production. Those are bookkeeping machines and cash drawer machines. Potentially they are competition on both of those. With respect to adding machines, which represented 94.2% of Allen-Wales' production in 1941, we feel that there is potential competition with the National, that National would go into this line and develop it itself, and that the public interests would be served by maintaining Allen-Wales as a source of supply for independent office equip-

ment dealers. That is, competition at the distribution level will be substantially reduced if National acquires Allen-Wales and markets the adding machines and the other [fol. 102] machines, if they market the first two machines at all, through their company-owned and controlled distribution outlets.

The Court: Do you have any figures, or will they be introduced by the Government here, concerning the profit or loss on these particular items?

Mr. Moyer: I believe Mr. Pickering, of Allen-Wales is here and that he was to furnish that information as a National witness.

The Court: All right.

FURTHER STATEMENT ON BEHALF OF PETITIONER

Mr. Graydon: Your Honor, before we proceed, I think I am given some glimmering of what his governmental theory is, and it seems to me it is an entire novelty in the history of jurisprudence under the Sherman and Clayton laws. To dispose of one thing, they say first if we don't get Allen-Wales that we will go into the manufacture of these machines anyway. If that is considered relevant, your Honor, we have witnesses here to show it would take five to ten years to develop that. But I will pass that; that is speculation as to the future.

Then they have introduced a new element. They say Allen-Wales represents 30% of the independent dealers, and then they refer to maintaining competition at what they call the dealer distribution level. If your Honor has in mind the provisions of the Clayton law—and this decree was entered two years after the Clayton law was passed—the Clayton Act deals with the acquisition of stock of one company by another where the effect of the acquisition will be to substantially lessen competition between the purchaser and the seller. And I submit to your Honor that this question about the effect on some little merchant is not in this case; it has got nothing to do with this decree or the Clayton law.

[fol. 103] **RALPH C. ALLEN**, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Examined by Mr. Moyer:

Q. What is your full name?

A. Ralph C. Allen.

Q. What is your present occupation?

A. President, Allen Calculators, Incorporated.

Q. What products do Allen Calculators, Incorporated, manufacture?

A. Adding machines, bookkeeping machines, calculators, cash registers.

Q. How long have you been in the business?

A. Eleven years. You mean this business?

Q. Yes. How does Allen Calculators distribute its products?

A. Almost entirely through dealers.

Q. How important is it to independent office equipment and business machine dealers to have available to them a line of adding machines?

A. Very important.

Q. Why?

A. Well, they sell machines regardless of larger companies who sell through agents. They sell for their own account and sell many other items in the office equipment field, typewriters, service machines, and so forth.

Q. Their business depends on the availability of a large number of items?

A. Quite true.

Q. One or two or three items may be the critical items as between profit and loss under an independent dealer.

Mr. Graydon: We object to that.

The Court: It is preliminary. There was some discussion by Mr. Pickering about that. All right.

A. (after last question was read): That is true.

Q. What items would those principally be?

A. Typewriters, adding machines and cash registers.

Q. By cash registers do you mean second-hand National and other cash registers of that type, or do you mean cash drawer machines?

A. Well, any device which has a box to hold money and [fol. 104] a recording mechanism is a cash register.

Q. And an independent dealer must have—

The Court: I wonder if it would not be better to show whether we are talking about a new or used business, because we have to take almost judicial notice of the fact that the typewriter companies have their own agencies and are not handled through independent dealers. I think that ought to be made clear at this point, whether we are talking about new business or used machines or what it is about.

A. Your Honor, I believe that you will find in the typewriter industry some of the companies, not only the four large ones, do sell through dealers. It is not controlled as in the cases of Burroughs and National Cash, with direct agents. In large cities, yes, but in some advantageous points even the large companies have established dealers.

The Court: Of course, we are talking about the general rule and not the exception. We want to keep that straight.

Q. What would be the effect on independent distributors in relation to the availability of cash drawer machines and adding machines if the National Cash Register Company acquired the Allen-Wales Adding Machine Corporation?

A. It would be disastrous if they were not satisfied on the offer of the National.

Q. You mean that they personally would suffer injury or there would not be other products available to them?

A. There might be, but not necessarily openings for everybody.

Q. When you say other products might be available to them would that be in substitution for presently established dealers?

A. Yes.

Q. You saw the demonstration of Petitioner's Exhibit 7?

A. Yes.

Q. Are you acquainted with the National Cash Register accounting machines?

A. Quite well.

Q. Does the National Cash Register produce a machine similar to this?

A. Yes.

[fol. 105] Q. Would you explain the function of this machine—that is Petitioner's Exhibit 7—and compare it with

a similar National Cash Register Company machine, explain their functions?

A. Well, an Ellis type is a simpler mechanism. It is comparable to this. You could build up duplicates. I believe they are offered freely.

Q. Is that National Class 3000 machine, stripped of the common features used for listing, the National comparative machine?

A. It is not the same as this. It has not the same keyboard arrangement. The same keyboard could be made up. I don't know what their sales allowance or price lists offer. It could be done.

Q. How many cash drawer machines were produced in 1941?

A. Approximately twelve or fourteen thousand.

Q. Does each sale of a cash drawer machine replace a cash register sale or displace a cash register sale? Strike that question out. A businessman wanting a receptacle for his funds, does he have a choice other than between a cash drawer machine and a cash register?

Mr. Graydon: I think that is a conclusion.

A. It is the customer's choice.

Q. If he buys one he doesn't buy the other?

Mr. Graydon: Just a minute, Mr. Moyer.

The Court: I think here for the record we will let the answer stand. Let's have the next question.

Q. If a sale is made of a cash drawer machine or of a cash register the customer is eliminated for the other?

A. That's right.

Q. Would the elimination of Allen-Wales' distributors limit the field for independent manufacturers to find outlets for their products?

A. Yes.

Q. Please explain why.

A. Well, the present set-up of the market, there are five independents, so-called, and Allen-Wales, Allen Calculators and Victor are the three larger organizations, Monroe and Barrett are the two smaller ones.

[fol. 106] Q. Independents?

A: Independents. With Allen-Wales removed it would affect a number of distributors who are now selling Allen-Wales.

Q. Do other independent manufacturers of business machines look to Allen-Wales distributors as outlets for their production?

A. Yes.

Q. The availability of independent office equipment and business machine dealers, does that eliminate the necessity of developing an entire sales organization when you go into the manufacture or development of a new project, expand your production?

A. Can you put that in fewer words?

Q. Strike the question, please. Could you start in business now, assuming you attempted to go into business at this time in the business machine field, manufacturing, could you start without independent dealer outlets?

A. Very doubtful.

Q. Why?

A. The large amount of capital it requires, and you would not be able to get distribution quickly.

Q. Approximately what would be the cost, in percentages, of going into the business at the present time as between production facilities and distribution facilities?

A. As I say, the distribution facilities would be by far the most expensive.

Cross-examination.

By Mr. Graydon:

Q. What do you mean by saying that distribution facilities would be more costly than going into the manufacture and production of a machine?

A. The time element.

Q. Do you take into consideration the cost of a plant and the acquisition of machinery and the employment of engineers?

A. Yes, I take that into consideration.

Q. And you say it would cost you more money to distribute than it would to build a plant and produce a machine?

A. That has been my experience.

[fol. 107] Q. Have you ever seen the plant of the National Cash Register Company?

A. Many times.

Q. Could you give us an estimate of what that cost?

A. Twenty-five million.

Q. You think it cost them more to distribute their product than to build a plant, build the machines, get into production on the line, you say it would cost more to distribute that product than to make it?

A. From my own experience.

Mr. Moyer: If your Honor please, the witness testified that starting from scratch, the development of production facilities and distribution facilities. Now, it may be that with independent distributors available the cost of distribution would be much less than with established distribution. I think the evidence shows that all right but the witness did not testify that generally distribution was more than manufacture.

The Court: You mean starting out from scratch at this point, is that right?

A. That is right.

Q. What do you mean by "independents" in the adding machine business.

A. Dealers.

Q. What?

A. The general rank and file of so-called typewriter dealers and adding machine dealers.

Q. You said there were five independents. That is what I want to know, what you mean by independent manufacturers.

A. There are two groups selling through their own organization, the four large companies, and five in the lower group.

Q. Take one in each group. Take Burroughs and the R. C. Allen. You call yourself an independent?

A. Yes.

Q. Isn't Burroughs an independent?

A. They do not sell to dealers.

Q. You are talking about the dealers. You are not talking about four independent companies, that the larger companies are independent, are you?

A. You state your question and I will answer it.

[fol. 108] Q. I am asking you what you mean when you say there are five independent manufacturers of adding machines.

A. There are, who, generally speaking, do not have among them any directly controlled sales agents but sell to consignors.

Q. What do you think—

Mr. Meyer: —I think the witness answered the question; it is not what the witness thought.

The Court: It is a little confusing. I think there may be something else than independent.

Mr. Meyers: May I suggest to the witness he means by independent manufacturers those who distribute through independent dealers? Is that right?

A. That is right.

Mr. Meyers: Is that your yardstick?

A. Yes, sir.

Q. That is what I wanted to get. You were president of the Allen-Wales Company?

A. Yes, sir.

Q. How did your connection with them terminate?

A. I was released from the service.

Q. You have some lawsuits, haven't you?

A. Not suits—suit.

Q. One suit. What is that about?

A. That is in regard to the amount of stock which I claim I have coming.

Q. Who is the defendant in that suit?

A. Harvey Gibson.

Q. Who is he?

A. Banker.

Q. What connection did he have with the Allen-Wales Company?

A. He organized the syndicate that purchased the business.

Q. How long has that suit been pending?

Mr. Moyer: If the Court pleases, I wonder if this isn't—

Mr. Graydon: —This reflects on the motive of this witness.

Mr. Moyer: I wonder if we haven't gone far enough with this collateral matter to indicate whatever counsel [fol. 109] is driving at?

Mr. Graydon: I am driving at the purpose and intent of this witness in coming here to oppose this sale.

The Court: The point about it is, of course, when a witness takes the stand he takes it for every purpose, the question of attacking his credibility, the purpose or motive.

Mr. Meyers: Except insofar as there may be a limit going into the collateral matter.

The Court: We haven't reached that limit yet.

By Mr. Graydon:

Q. Tell us about this litigation you got into after you were released, as you say, from the Allen Wales Company.

A. I don't know of any litigation.

Q. You just told us about a suit.

A. I said after I was released from Allen-Wales.

Q. Did you start the suit before you were released?

A. No.

Q. When were you released?

A. I was released September, '31.

Q. What year?

A. 1931.

Q. Then you got into a lawsuit?

A. I did not.

Q. Well, tell us about it now. Have you got something to hide about this?

A. What?

Q. Tell us about you and this man Gibson.

A. There is nothing to tell except I had a contract to buy some stock.

Q. Did you bring a suit against him?

A. That's right, 1940, I believe.

Q. Why did you wait that long?

A. Well, that is time enough.

Mr. Meyers: Your Honor, may I suggest the witness, since this is a matter of another litigation, may not wish to answer, and may incur prejudicing his rights in another litigation.

Mr. Graydon: He hasn't said he didn't want to answer.

[fol. 110] By Mr. Graydon:

Q. Will you tell the Court, Mr. Allen?

A. I don't believe I care to discuss this personal matter.

Q. It had something to do with your participation in Allen-Wales business, didn't it?

A. Nothing whatever, except the stock another man owns.

Q. Tell us why you are so interested in the fate of the distributors of the Allen-Wales Company.

A. I am not particularly interested in the distributors of the Allen-Wales Company.

Q. What position do you hold in the Allen Calculators?

A. The name of the firm is Allen Calculators.

Q. And your name is R. C. Allen?

A. R. C. Allen.

Q. You are president of the company?

A. Yes.

Q. And that is a competitor of Allen-Wales?

A. Very much so.

Q. And if Allen-Wales, by reason of purchase by National Cash, got a wider distribution and stronger backing, it would naturally furnish stronger competition to your company than in the hands of the Allen-Wales Company?

A. Yes—I don't know.

Q. That is your real motive, isn't it?

Mr. Meyers: May I suggest that that is a motive of the Government if the acquisition is made by National Cash Register Company. I think counsel for the National Cash Register Company has made the point for the Government.

Mr. Graydon: I am dealing with this witness in his attempt to intervene in this case.

Mr. Meyers: I say the acquisition of Allen-Wales will tend to drive competition out of the industry, and Mr. Allen represents one type of competition.

[fols. 111-112] By Mr. Graydon:

Q. You said you thought that the representatives, these distributors that have been selling Allen-Wales machines, would suffer if they were not satisfied with the offer of the National Cash Register Company.

A. I believe that could happen, yes.

Q. If they were satisfied, they would not suffer; is that true?

A. If they were satisfied.

Q. You heard the offer read, didn't you, the declaration of intention?

A. I did not follow it closely.

Q. If certain dealers couldn't give Allen-Wales machines that would be possibly entry for the sale of more of your products.

A. Under certain circumstances.

Q. Aren't you afraid, or isn't your company afraid of National Cash Register Company coming into the adding machine field?

A. I don't know as I am afraid.

Q. You are not glad to hear that they are coming in, are you?

A. I don't know that it excites me particularly.

Q. Well, didn't you have a petition filed here to try to stop it?

A. I think for the good of the independents the deal should be stopped.

Q. It is for the good of the independents you filed this?

A. No, I did not say that. I said I believe that the independents would be benefitted if the deal doesn't go through.

Q. You believe that you would be benefitted too, don't you?

A. I don't admit that. I probably will.

Q. Did you file this petition for the benefit of independents?

A. No. That is for our company.

Q. That is for Allen Calculators, Incorporated?

A. Right.

Mr. Meyers: If the Court please, the petition speaks for itself.

Mr. Graydon: All right. I want to find out if this witness know what is in it.

[fol. 113] The Court: I haven't seen it.

Mr. Meyers: The Court has denied the petition. I don't think there is anything before the Court.

Mr. Graydon: I want to see what statements of fact this witness has made contrary to the statements of fact he has undertaken to make on the witness stand.

By Mr. Graydon:

Q. You swore to that, didn't you?

Mr. Moyer: If the Court please, if the petition is to be introduced—

Mr. Graydon: —He swore to this record.

Mr. Moyer: It is not in evidence.

Mr. Garver: He made an affidavit.

The Court: What is it?

Mr. Graydon: This is that attempt to intervene, if your Honor please. There are eleven pages of allegations that this witness has sworn to.

The Court: It will be better if you will say what it is.

Mr. Graydon: It is entitled in The United States of America vs. National Cash Register Company, Equity No. 6802. Please take notice that Allen Calculators, Incorporated—

The Court: —I know what you are talking about now.

The Graydon: Signed and verified by Ralph C. Allen.

By Mr. Graydon:

Q. I see you state in Paragraph 4 here: "Thus no reason is shown in the petition of the National Cash Register Company why the National Cash Register Company should not develop its own line of adding machines or similar machines if it wishes to develop that phase of accounting machine business." Is that your language?

Mr. Moyer: I don't think the source of the language, the source of the petition—

Mr. Graydon: I want to find out if somebody else drew it up and got him to sign it or whether he knows what is in this [fol. 114] petition.

The Court: All right. I think we have reached the point for adjournment. We will adjourn until ten o'clock in the morning.

Mr. Graydon: We have finished with the witness, if your Honor, please.

Mr. Moyer: I think I can finish in another five minutes, and we may be able to wind up.

Mr. Graydon: If you enter into anything new I might withdraw that.

The Court: Let's proceed.

ARGUMENT ON BEHALF OF GOVERNMENT

Mr. Moyer: May it please the Court, the Court is quite correct in its statement that this proceeding is governed by the terms of the decree. I think we should carefully analyze the decree, turn to the decree, to judge exactly what the proceeding is. Paragraph Second, Subdivision (p) of the decree prohibits the National Cash Register Company from acquiring either ownership or control, in the alternative, directly or indirectly by means of stock ownership or otherwise—a general prohibition against any device, any means, direct or indirect, of acquiring the whole or any essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices. Those terms seem to be as broad as possible to cover any means or any device of acquiring any phase, in whole or in part.

The Court: Excuse me just a minute. They are absolutely by injunction prohibited from doing that.

Mr. Moyer: Pardon?

The Court: They are absolutely by injunction prohibited from doing just what you say, but then it goes on—the second paragraph, or second part of the paragraph controls: “Provided, that in case any such acquisition is desired, a petition [fol. 115] may be presented to this Court, which reopens.

Mr. Moyer: I am referring to the first portion of the paragraph merely to lay the foundation for calling the Court's attention that this does not involve merely the scope of the Clayton Act or, for that matter, merely the scope of the Sherman Act or Section 5 or 6 of the Federal Trade Commission Act. This involves a general prohibition, with the exception I believe interpretable only in terms of the general prohibition. I am not claiming that the exception, in so far as its scope, that is, what facilities it covers, what type of competition it covers, is any narrower than the general rule, but I say the whole section is a broad decree, and exception from that broad general rule that applies all the way up and down the line, any part of the business. Certainly, the dealer, the method of distribution, even the good will is incorporated in a distribution set-up, and certainly the testimony we had yesterday, that starting from scratch in this business you would have to spend as much developing distribution as you would in developing production, indicates that that is an important part. It may not be the

whole, but the terms of the decree apply to any part. And it is general with respect to cash registers or other registering devices in interstate or foreign commerce. Then there is an exception, an escape provision. And under what terms does it operate? It operates first upon the filing of a petition—that has been done—in which reasons have been stated, and then we come to an important condition of the escape clause, “and if the Court upon investigation into all the circumstances of the case”—unlimited, as broad as the previous prohibition.

And I might interpolate here, your Honor, that I have not regarded this proceeding, and I don't believe proceedings under this decree are properly regarded as an adversary [fol. 116] proceeding between the Government and the National Cash Register Company. Rather, the Court is charged under this decree with determining the scope of the investigation and all the circumstances, and we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act. And I might say at this time that if the Court believes that we have been deficient in providing the Court a full picture of all the circumstances, if the investigation doesn't cover what the Court believes it is charged with doing upon its investigation, we will gladly undertake to supply any deficiencies with respect to presentation.

And, interpolating again, I believe that is important with respect to the statements of the distributors which I will refer to later and which I hope the Court will take an opportunity to read, because we consider those secured and furnished for the purpose of aiding the Court in its investigation and securing information for it from all possible sources.

Before concluding our comments on the terms of the decree I would like to point out one additional thing. Recently Judge Wyzanski, in the District Court of Massachusetts, had a question involving an antitrust proceeding. There was a question of intervention. He made this very illuminating statement:

“Judges must be willing to hear from more than the conventional parties in an adversary procedure, to receive expert suggestions from specialists and governmental agencies, and accept economic testimony ap-

propriate for laying down a broad rule in industrial government and to find decrees suitable to the character of the many dimensions of the problem revealed."

That was in connection with an antitrust proceeding similar to this, where the Court is called upon to consider by the decree all the circumstances, any part of the business.

[fol. 117] The Court: This is not an antitrust proceeding here. In the beginning it was unfair trade practice, I assume.

Mr. Moyer: Originally it was a case brought under Sections 1 and 2 of the Sherman Act.

The Court: I just have a faint recollection of it. But here you have eight or nine companies in the same business and four of them are large competitors, but that is not strictly in the case here today, as I see it. Originally, yes, it was definitely in the case, but this decree takes care of that.

Mr. Moyer: I know that is definitely a question and I will take that up.

The decree continues, that the business—still general and all-inclusive—or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition. Then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right. That provision I think is all-inclusive; it covers any phase of competition, whether distribution reacts on manufacture or manufacture reacts on distribution, and you can build a monopoly or you can build a series of restraints in either by controlling one or the other. The decree covers it whether it is directly or indirectly. It covers it in this case, all phases of the business, directly, and under indirectly it covers any phase that leads to restraints or monopolization or unfair trade practices in connection with the acquisition of any part.

Now, what position do we take when we come to interpret a decree of this type? The complaint in the case that was filed is replete with references; I might say the opinions of both the District Court and the Circuit Court of Appeals in the criminal case that counsel referred to as having been [fol. 118] reversed are replete with reference to the fact that

control of the distribution, knocking out the distributors of a competing company, or potentially competing company, was one of the major phases by which the cash register monopoly was established. And, incidentally, the reversal, as I understand it—I did not have the opportunity that counsel did to participate personally in it—the reversal in the Circuit Court of Appeals was on the basis that the monopoly had been completed three years before the action was brought, and therefore, the statute of limitations had run. I don't think that decision on that point is good law today. At any event, there was no question about the fact that a monopoly had been established, had been established through the very practices or practices with the same effects as the company proposes today. Now, with that background and with this provision in the decree, what reference do we make to our statutes in determining the scope of operation of the decree? I believe, your Honor, the Government takes the position that this must be interpreted and applied with the sophistication that comes from just good sound common sense, and that is incorporated in our statutes. And the decree goes further than the statutes in that it recognizes a general overall principle that doesn't contain the exception that the Sherman Act may contain, of whether it is reasonable or not, whether it is a reasonable interference with competition—merely substantially reduced competition.

I want to call your Honor's attention to the provisions of the Sherman Act, the Clayton Act and the Federal Trade Commission Act. Under Section 1 of the Sherman Act:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal,”—

a general prohibition against any contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. Under that Act, if the two corporations involved here today should enter into an agreement, [fol. 119] or enter into a trusteeship of their stock, or should take any joint action that would involve joint price-fixing of Allen-Wales products, a joint boycott of Allen-Wales dealers, the vesting in National Cash Register the power to determine who might purchase Allen-Wales prod-

nets—I could go on indefinitely along that line—such agreement, such combination, or such understanding would inevitably and unquestionably be a violation of Section 1 of the Sherman Act.

The Court: May I suggest something here? I fail to see anywhere in the record so far any suggestion of restraint of trade. The whole theory of this case, as I see it, is just the reverse of restraint of trade. Mr. Pickering testified yesterday that their capital was \$1,650,000, subject to certain liabilities, that it would require the same amount to go into the cash register business, such as National.

Mr. Moyer: They are in the business.

The Court: I know, but what he called a cash register would take ten or fifteen more years; that they have a limited method of doing business now; that they have two offices of their own and the rest is through dealership; they are unable to reach all parts of the United States; that there are plenty of sections of the United States that haven't even the benefit of their adding machines. And I wish, too, you would keep in mind that whatever is said and done is always controlled by this word "substantially". I just want to give you some thoughts of what is going through my mind at the moment. I remember that chart was 69,000 units of National Cash against 357 of Allen-Wales, which covers about 3% of the units here. I think the Government has stipulated that the adding machine proper is not made by National Cash at all; is that right?

Mr. Moyer: That is correct, except for those sales of 359, was it?

The Court: 357 or 359.

Mr. Moyer: To the Federal Reserve Banks.

[fol. 120] The Court: I only want to suggest to counsel here that the Court, of course, is controlled by the Supreme Court, and that 94% of the business relates to the adding machine alone, and, as I follow that International Shoe case, there was a question of 5% which they held did not substantially lessen the competition. So if counsel keep that in mind, that is what we are interested in.

Mr. Moyer: I might say with respect to the International Shoe case there was a very strong dissenting opinion and the majority opinion, because of the statements of distribution that were in competition and because of potential competition between the two companies, eliminated those ques-

tions from the case on the basis that the company that was being acquired was either insolvent or in the process of bankruptcy. That was similar to the acquisition of the Remington Typewriter Company in this case, where there were at least representations to the Court that the Remington Company was going out of business anyway. We have that situation. There may be some question about potential competition and the seriousness of the continued availability of the product in competitive distribution channels; but in the International Shoe case the questions we raise here were considered, as I regard the case, by the majority and eliminated because they considered the company would be out of business anyway. The dissenting opinion said that shouldn't make any difference because even a bankrupt company can be reorganized and in time will be back in operation. It seems to me that is what that case turned on.

The Court: Well, I go along on those facts too, but the point is that they did hold that a bare 5% cannot be construed as substantially limiting competition.

Mr. Moyer: The real crux, eliminating the facts the Court eliminates—I am not eliminating them; I will refer to them later—eliminates the fact that Allen-Wales has just gotten started, that the 5% represents the first year in which they were really getting under way in these competitive machines with National, that the war has dislocated everything and distorted the picture with respect to production. If we disregard that, we still have the major question, and [fol. 121] a question of real substance, where we have at least 65 to 70% of the available business machines distributed through company-owned systems as against the four other minor companies who have approximately 30% of the business distributing through independent dealers, and now the National, the biggest, or at least equal to the biggest of the four majors, wants to acquire the largest independent. It simply means that the public, independent dealers, a whole system of competitive distribution—and that is important to National it is a major part of their business—disappears. The only opportunity the public has when it is faced with that type of distribution system is to deal according to the regulations established on an administered basis at the concentrated control of the home office. As contrasted with that we have small dealers operating their own businesses. They are able to cut prices,

they are able to meet competition by trade-in allowances, furnishing additional services, they take old machines and remake them. National destroys them; they want them off the market. The continued existence of manufacturers who can supply these independent dealers—there probably aren't more than 4000 in the United States, all over—they depend on a variety of lines, I think the testimony clearly shows.

The Court: I tell you, I am sorry I can't go along with you. I have a natural sympathy, you understand, for everything you are saying, but again I have to tell you that I am controlled by this decree, as I see it.

Mr. Moyer: Your Honor, the putting out of business of a group of independent dealers does not supplement the business, any part of the business of National—and your decree speaks of "any part". When this decree was written I am sure it wasn't contemplated by the Court with this language—and I am speaking only of the language; I don't know what was on the Court's mind—that it did not intend a continuance of National's acquisition of strong independents and they did that before 1912 and are continuing to do it now on the theory that this is a limited [fol. 122] prohibition. It is not limited.

The Court: Just a thought again. Suppose the Government took the same position when you had fifty or a hundred small automobile manufacturers and today we have got three big groups, suppose the Government took the same position then, hasn't the public gotten the benefit of what was done there? Hasn't the public gotten the benefit so far when you see machines like these? I am only posing that as a suggestion in behalf of the general public as opposed to a group of small dealers. Of course, everybody gets hurt somewhere along the line, I understand that.

Mr. Moyer: Don't mistake our position as being one merely of sympathy with a man who loses in the competitive struggle.

The Court: All right.

Mr. Moyer: A business should rise and fall on the basis of its own ingenuity and technique and there should be competing technology. The main business manufacturer should always be faced with the competition of these cheaper machines. Why shouldn't there be a market for the beauty shop, for the small business man? The whole

philosophy of the concentration that is represented by the four majors here, three majors in the automobile industry, two, three or four in the chemical industry, is the philosophy expressed by Mr. Allyn when he said, "Why, those are just little people." The availability of competing products, of maintaining and keeping these companies on their toes, the survival of that competition, is a matter that the public deserves. National Cash Register Company has developed, it has grown, it has even been engendered by orders of this Court. They at least owe it to the public to use their technology, and I think it is ridiculous for a company with the available supplies in research and technique of the National Cash Register Company to come before this Court and say "We can't develop a new machine. We have got to save a year by putting the largest of the independents out of business," cutting off the public benefits that come from maintaining independent office equipment people and business machines men in operation. Sure, [fol. 123] they are the only ones that don't operate on administered prices, they are the only ones that can compete with the little fellow, can get a deal. The National Cash Register Company owes it to the public to develop its own machine. They have a distributive system. Let them compete. Let them compete in technology. They are acquiring the technology of a cheap machine. That is what this is. When I say use sophistication with common sense does anyone expect National to continue to produce Allen-Wales machines that will interfere with the sale of National machines? No. Price reductions haven't followed previous acquisitions. Mr. Allyn testified to that. Prices have dropped, the whole price level has dropped in that period. But, irrespective of whether prices were increased or decreased because of acquisition, the Sherman Act, the Clayton Act and the antitrust laws and our whole system of free competition that I think this decree was meant to incorporate in the future conduct of this company dictates that there shall not be four majors with administered and concentrated management spread throughout the country acquiring fifteen or thirty per cent of independent competition that is left. If we proceed on that line—And, referring to the 5%, there was some testimony that several companies manufacture this particular machine (indicating); some of them buy adding machines, apparently, some of them buy the drawers, various combinations. Some equipment

dealers may put them together. That isn't the major part of any one of their businesses. Mr. R. C. Allen testified they are 12,000 units in one year; Mr. Allyn of National testified 13,500. R. C. Allen testified, I believe, during that period they had approximately 2,000. Allen-Wales, who had just gotten started, had several hundred and they went into the business because their dealers insisted on it. The letter of June 5th to the dealers said "You have been demanding that we go into this business"—because the dealers wanted it to supplement their line.

[fol. 124] The Court: Just another thought. They are competing right now against Burroughs, aren't they, and they are competing against Remington Rand.

Mr. Moyer: That is right.

The Court: How is this picture going to be changed if National goes in and furnishes stronger competition to the Burroughs and stronger competition to the Remington Rand? Wouldn't the independent man be better off than he is now?

Mr. Moyer: He won't be able to get machines.

The Court: Why?

Mr. Moyer: The source of supply is 33% less.

The Court: Why can't R. C. Allen's company then grow and furnish that part?

Mr. Moyer: Will they?

The Court: I don't know.

Mr. Moyer: We can't risk that. That hasn't been the history. That isn't the history of these acquisitions. The only way R. C. Allen can remain in business is if there are independent equipment dealers available, and I take it that was Mr. R. C. Allen's interest in coming here. He did not say that he would take over the business of the Allen-Wales; he said what he needed for the continuance of his business and the expansion of his business were independent outlets, outlets through which he could distribute. And you eliminate all these Allen-Wales dealers. And, your Honor will, I believe, and I urge you must strongly to review and read the statements made in reply to the Department's questionnaires. And I might say these are stipulated.

The Court: I will read every one of them.

Mr. Moyer: I would like to call your Honor's attention to this one. In answer to the question: "Are Allen-Wales products or substitutes for such products essential to a

[fol. 125] business such as you are conducting? Why?" They say:

"Yes. Our business is strictly selling and servicing business machines, such as those manufactured by The Allen Wales Adding Machine Corporation. Businesses such as ours are dependent upon manufacturers such as The Allen Wales Adding Machine Corporation in order to have products to sell and be a competitive factor in this business with other major lines. Our selling organization depends upon this type of equipment to sell, whereas our service organization depends upon what the selling department sell, so these products are definitely essential to our business."

The Court: Mr. Moyer, there are a number of those that take exactly the opposite view, aren't there?

Mr. Moyer: There are, I believe, two or three that do. All that we received are here. One that has a different reply also told us that he has entered into a contract with National. Here is one: In reply to the question, "The probable effects upon your competitive position with respect to other distributors of business machines or office equipment, if you could no longer handle the products of the Allen-Wales Adding Machine Company?" they said:

"If we can no longer handle the products of the Allen-Wales Adding Machine Corp., it will put us at a decided disadvantage in our competitive position with distributors of other office machines. This is emphatically true in our position as competitors of Burroughs Adding Machine Co., Underwood Elliott Fisher Co., and Remington Rand, Inc. With the Allen-Wales line, we have a machine that compares with the best any of these companies can offer. Without it there is no line we can secure that will compare favorably with either of the mentioned companies."

And when your Honor says, "Why can't they secure supplies from some other independent manufacturer?", recognizing the limitations just statistically, on statistics produced by National, the availability of independent production is reduced by at least one-third. Now that reduction to one-third in many instances—and I believe Mr. R. C. Allen testified to that—in many instances if an Allen-

Wales dealer is to get supplies from his company or from some other independent it simply means replacing some [fol. 126] dealer they have now. National has given us a description of the delay of one year that would occur if they use their own technology to develop an adding machine, and by all means we would like to see them go into the adding machine business on their own development. Unless our technology is bankrupt, if a company like the National can't go into business on its own know-how we are technologically bankrupt. And they can do it. Mr. Allyn testified it would just take a year, that is Mr. Allyn of National.

Mr. Graydon: No.

Mr. Moyer: Even if it were twenty-five years, it takes years to develop an independent distribution system. Every one of these dealers will have to make a readjustment. It means a readjustment all the way down the line on the competitive situation.

Now, with respect to the implications of that, this isn't any novel theory. There is nothing at all novel about it. The Supreme Court has emphasized it time and again, and it is essential that we do it if we are going to avoid a complete concentration in the control of one, two or three companies in a field without the discipline that comes to them without the existence of independent manufacturers and independent distributors.

The Court: If this were an original action that was unlimited it would be different, but you want again to come back to the fact that we have a decree that was entered some thirty years ago, and that is the controlling factor.

Mr. Moyer: No question about that, your Honor. The decree is controlling and the scope of the paragraph that the Court is now called upon to interpret to my mind is without question sufficient to cover the implications and the consequences not only with respect to manufacturing facilities but with respect to distribution facilities. It says "any part of the business"—"the whole or any part." A reading of the other provisions of the decree indicates that activities with respect to distribution and the elimination of [fol. 127] independent distributors was definitely a part of the decree. And, as I say, I think under this provision of the decree we can look to general effects, we can look to what the consequences will be rather than applying a per-

centage term under the Clayton Act, which in the International Shoe case was 5% without future or potential competition. We can apply, and I think we are required to apply, the general provisions of the Sherman Act. The Sherman Act is the act under which the case was brought and under that if there were an agreement on price fixing, if there was joint action between these companies as to cutting off dealers or what dealers should buy or who should take a particular dealer; that would be, *per se*, a violation of the anti-trust laws. That is clear from the Socony-Vacuum case. Now because they come before this Court with this decree, with a particular type of device, to wit, acquisition, the Court certainly isn't called upon to close its eyes to the effects. The fact that they choose to gain control directly or indirectly by means of a stock acquisition is immaterial under this decree. The decree is general. It incorporates the antitrust laws, not only the antitrust laws but their spirit and provisions for free competition in industry.

I have mentioned the Socony-Vacuum case. I take it the Court is familiar with that. That is a general price-fixing case. Of course, the Ethyl Gasoline case involved dealers and distribution, maintenance of prices and boycott at that level. I call the Court's particular attention to *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U. S. 457. In this case the Court was interpreting the Federal Trade Commission Act and it made the observation: "Determination of the correctness of the decision below requires consideration of the Sherman, Clayton and Federal Trade Commission Acts." It goes on to say, in discussing the case involving disciplining dealers, eliminating competition among other things, among dealers:

"As a result of their efforts, approximately 12,000 retailers throughout the country have signed agreements 'to cooperate' with the Guild's boycott program, but more than half of these signed the agreements only because constrained by threats that Guild members would not sell to retailers who failed to yield to their demands—threats that have been carried out by the Guild practice of placing on red cards the names of non-cooperators * * *"

That is the way it operates. The Court observed:

"If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition."

And one of the provisions was:

"garment manufacturers shall sell to retailers only upon the condition and understanding that the retailers shall not use or deal in such copied designs."

The Court went on to say:

"Not only does the plan in the respects above discussed thus conflict with the principles of the Clayton Act; the findings of the Commission bring petitioners' combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself. Section 1 of that Act makes illegal every contract, combination or conspiracy in restraint of trade or commerce among the several states; Par. 2 makes illegal every combination or conspiracy which monopolizes or attempts to monopolize any part of that trade of commerce. Under the Sherman Act 'competition not combination, should be the law of trade.' *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129. And among the many respects in which the Build's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy (*Montague & Co. v. Lowry*, 193 U. S. 38, 45; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 48-49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott (*Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U. S. 600, 609-611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs (*United States v. American Linseed Oil Co.*, 262 U. S. 371, 389); and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs."

[fol. 129] The Court: I can't find any fault with that either, but that isn't here.

Mr. Moyer: It is here, your Honor, if this decree means what it says, any substantial competition,

The Court: Just a minute, please. We will have to go back to that again. I agree with you that you are quoting word for word what is in the decree and there is an injunction against doing any of those things. But it goes on to provide further in the event they want to go contrary to that provision then they come into Court, after giving the Attorney General sixty days notice, and so on. So that is why we are here, you see. They want to avoid that injunction to the extent prayed for in the petition. That is the issue here.

Mr. Moyer: And, your Honor, I say, passing the other questions for the moment, we will have the elimination of substantial competition, not only substantial competition but an invaluable and important segment of our competition when we shift from an independent manufacturer selling to dealers to a completely integrated operation by the National Cash Register Company. We are eliminating—there is no question Allen-Wales furnishes 33% of the source of supply for independent distributors. The continuance and expansion of all the independents depends on the continued availability of machines and supplies from independent manufacturers. We have the two working together. We aren't for a moment questioning National Cash Register's propriety—as I say, we urge it—of going into the adding machine business, but we don't think they should just go into the business by at the outset eliminating on the basis of their entire integrated operations 30% of competition in the business machine field. And to each of these dealers and to each of these manufacturers it is important that they should be able to get ten, fifteen, twenty or a hundred machines a year from a number of manufacturers. He has to carry a large number of items. There is substantial competition, your [fol. 130] Honor, and when I refer to the scope of the decree I think we would be blind if we said all we have involved here is manufacturing, and because an accumulator has to be fastened to the Allen Wales machine, or because this machine can be taken off of this, or because there is some minor difference in machines—that is a matter of salesmanship, that is where they compete, and

on price—we would be blind if those considerations were the controlling considerations. The basic substantial feature of the competition that will be affected—

The Court: You agree to this, that the real reason that the Government is here is on the theory that if this purchase were permitted to go through that the ultimate effect would be substantially lessening completion.

Mr. Moyer: That is exactly our position, and we don't think the case can be determined by lining up percentages under the Clayton Act, although the Supreme Court has gone pretty far in some cases just on a percentage basis.

Mr. Graydon: Mr. Moyer, before you finish—

The Court: —I was just going to ask a question. Do you want to supplement this argument with a brief, in view of what has gone on here now, the suggestions that have been offered? I say, in view of the suggestions here, that is, the Government's position, that if this purchase were permitted to be consummated it would substantially lessen competition and violate the anti-trust law and the Clayton Act.

Mr. Moyer: Violate the decree. I mean I even don't like to use the language "in violation" here. We believe that the Court should be fully and completely informed, and we are attempting to do it to the best of our available facilities and knowledge. So if the Court will—

The Court: I don't see what else you could furnish. I think the statistics right down to the minute have been furnished, and I don't see what else the Government could do to add to the case.

[fol. 131] Mr. Moyer: We had the alternative of calling a hundred or a hundred and fifty independent distributors. We couldn't do that under the circumstances.

The Court: Suppose you did that and the other side called ten thousand to prove they had been benefited. We would be back to where we started.

Mr. Moyer: I hope the Court will read those carefully.

The Court: I will do that. Suppose we recess for a few minutes before we go ahead. You supplement your argument here with a complete brief, if that is agreeable; if it isn't, say so.

Mr. Graydon: I want to submit the case now.

Mr. Moyer: I haven't completed my case.

Mr. Graydon: I mean at the end of your argument. Do you want to file a brief or do you want to submit the case.

Mr. Moyer: If the Court desires a final brief I certainly will. My personal preference would be to file a brief. I don't think it has to be a very extensive brief, but I would be guided by the Court's suggestion.

The Court: Suppose we recess at this point for about ten minutes.

Thereupon a short recess was taken; after which the hearing proceeded as follows:

Mr. Seasongood: Your Honor, could we have this entry? I have given them copies and now it has been stricken out, "on the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered herein and the only parties involved in such controversy are the Government of the United States and said National Cash Register Company"—that is stricken out as your Honor directed and it is rewritten with those words out and copies furnished to counsel (handing entry to the Court).

The Court: You may finish them, Mr. Moyer.

Mr. Moyer: I would like also to call the Court's attention to *Standard Fashion Company v. McGrane-Houston Co.*, 258 U. S. 346. In that case the Court, recognizing the potentialities, that is, the potential dangers inherent in the [fol. 132] elimination of independent distribution outlets and the continuous facing of control in larger cities, held that where one company controlled approximately two-fifths of the patterns distributed by dealers, controlled by dealers, that a contract which prohibited the sale of patterns of others would be invalid under the Clayton Act. The Court said:

"The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands of small communities amount to giving such single pattern manufacturer a monopoly of the business in such community."

That is, through the dealers.

"Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue, may tend to facilitate further combinations; so that the plaintiff, or some other ag-

gressive concern, instead of controlling two-fifths will shortly have almost, if not quite, all the pattern business."

The Court made reference that the public interest had been served by the survival of one hundred and fifty automobile companies.

Under the governing legislation, or under a decree of this type, it seems to me that again is foreclosed by the spirit and the basic franchise contained in our antitrust laws. The ultimate effects of a merger or consolidation, where you have one hundred and fifty people in the field, are distinguished from four majors, four minors, and we are determining the fate of one, seems to me to be an entirely different question. We are down to the question where we have the four majors and the three minors and the minors having only 30%—we are down to the question, is there any terminal point?

When we reach the question of where is the terminal point I think we have to refer to the basic spirit of our antitrust laws, which say that competition and not combination shall be the rule. Certainly, for example, the acquisition by General Motors of Willys-Overland would eliminate substantial competition where you have the lowest priced car in the field. It is significant that the major automobile companies, it is a significant factor that the [fol. 133] major automobile companies have not produced—

The Court: What I wanted to get over to you was simply this, that sometimes, no matter how earnestly the Government tries and no matter how high their motives are, you cannot control economy and invention, and that the public is entitled to the best that they can get for the least money. It may be that somebody is going to get hurt along the way while that is going on.

Mr. Moyer: But the way we secure that, the best for the least money, is only through competition.

The Court: That is what I said again. Now we come right down to—you say that is your position here, that the consummation of this deal would substantially lessen competition, and that is what we ought to be talking about. You see, every one of those authorities that you cite is the law, but they all rest on situations peculiar to that case.

Mr. Moyer: Every situation under the antitrust laws always has, every case has ten, twelve, fourteen or fifteen elements in it. There are no two cases that are on par. The basic factor is that our whole economy is based, we are fighting a war to provide the survival of our free enterprise system and the government's point on substantial competition is not only with respect to the potential competition which, as I have indicated, the Supreme Court has taken cognizance of, but it is with an essential facility of the business, the distribution system, which I have also pointed out has been recognized as one of the elements. That may be a minor factor in some case; here it is a major factor. I think in sophisticated common sense it is obvious and the policing that comes to an industry through independent manufacturers and the outlets they must use if they are going to continue in business and expand, the independent dealers, it is clear, that that is threatened in this case.

Of course, National can go in the adding machine business, but it is the indication of monopoly thinking they feel they have to go into it. Suppose it takes five years for them to go into it, they will be there. It takes years [fol. 134] to develop a business. That is why we should preserve the few independent competitors who are developing their lines and preserve the outlets through which the lower-priced disciplinary competition reaches the public. We can speculate forever as to whether steel prices would be higher or lower if there wasn't concentration in the steel industry. In many other industries it is spread on the record of antitrust proceedings, there is no question about it, but the basic thing is, and I reiterate the test that we are called upon to apply, is, does this promote or does it substantially interfere with competition? The Court basically must weigh the convenience of National going into the adding machine business against the total disappearance of 30% of the independent competition. Certainly, the adjustments on one side, the time of readjustment, if readjustments can be made, are equal. National has presented its case. We can't compete with National in salesmanship. They have made a beautiful presentation in terms of charts and exhibits.

The Court: I think your position is very clear. There is no question on that score. It is not a question of sales-

manship, it is a question of fact. Do you have any other points to make here? I am sorry to have to get some thoughts over has shortened your time.

Mr. Moyer: If the Court would permit me just to check my notes for a moment.

The Court: Yes.

Mr. Moyer: There is just one point I wish the Court would bear in mind I think we are right about, and that is the point in this industry where we have to draw the line about acquisition if we are going to be able to maintain any independent competition, even though it is only 5% here and even though it may not involve all the dealers.

The Court: Isn't that a question for Congress to determine?

Mr. Moyer: Not at all, but the Court, under this decree, has to determine that. You have to determine whether it is going to substantially reduce competition. If there were one hundred and fifty companies, all of equal size in the field, a merger of two of them might not violate the anti-trust laws, it would be a question under the decree. Of [fol. 135] course, the Court in those circumstances would probably—if there were twenty-five companies the question would be closer, but where you get down to the situation we have here, if we permit this acquisition we would have to say this is the last acquisition because there won't be any independents left. It is 5%, 10%, 15% of independent production when independent production is down to 30%. All right. The court has full legislative authority and full authority under the decree and the duty to pass on this question.

The Court: We just have a right to interpret it and enforce it.

Mr. Moyer: I think it is covered by what we have before us. It is not a further matter for the legislature.

There are a few points I would like to touch on with respect to the case of the National Cash Register Company. Frankly, I don't think the National Cash Register Company has carried the burden of proof over the entire field of the industry involved, that is, of the business involved. They may have mechanically on the 5%, that is, on the manufacturing of 5%. They have not developed the potentialities of manufacturing for any period of years, which is an im-

portant consideration. Nor have they met the burden of showing that there will not be a substantial lessening of competition in phases of the business—and the decree refers to business when it says substantially lessening competition. It does not refer back to manufacturing. It refers to all the elements considered. They have not carried their burden there. They must convince the Court. If the matter is equally balanced it is up to them to convince the Court. They have not given us any assurance of public benefit other than the convenience of getting them into the adding machine business, and against that we weigh all speculative factors of when war contracts and war production will be terminated. Allen-Wales may be able to get back into production two years before National Cash Register Company. We don't know how soon war production and contract production is going to terminate. Certainly, [fol. 136] the statement by the president of the National Cash Register Company does not come from the insistence of the independent dealer who serves the small man.

The Court: I think that has all been covered.

Mr. Moyer: One further matter. If the Court should ultimately hold against the contention and position of the Government I think without question the decree should require the supplying of Allen-Wales parts to all customers. The testimony showed that National does not sell parts to independents. If the independents are to carry on their business of servicing machines, parts must continue to be available to them. There is a question of whether they should be permitted to destroy second-hand Allen-Wales machines.

The Court: Suppose you make that point in your brief.

[fol. 137] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 138] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

No. 6802 (C. C.)

THE UNITED STATES OF AMERICA, Plaintiff,

VS.

THE NATIONAL CASH REGISTER COMPANY, et al., Defendants

THE UNITED STATES OF AMERICA,
Southern District of Ohio,
Western Division, ss:

I, Harry F. Rabe, Clerk of the District Court of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing pages contain a true, correct and complete transcript of the Record on Appeal in the above entitled cause, in accordance with the praecipes of the parties filed herein, excepting Request No. 11 of Appellant's praecipe, entitled "Proposed entry containing ground of refusal of leave to intervene", which said proposed entry is not on file or of record in my office.

I further certify that the foregoing pages also contain a true and correct copy of the Statements of Appellant and the opposing Statement and Motion of the Appellee, filed under authority of Rule 12 of the Supreme Court of the United States.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 30th day of December, 1943.

Harry F. Rabe, Clerk U. S. District Court, Southern District of Ohio. (Seal.)

[fol. 139] SUPREME COURT OF THE UNITED STATES

STATEMENT BY APPELLANT OF POINTS AND DESIGNATION OF
PARTS OF RECORD—Filed January 10, 1944Statement of the Points On Which Appellant Intends to
Rely

I. Appellant was entitled to intervention of right under Rule 24(a) (1), (2) or (3).

II. If appellant was not entitled to intervention of right under 24(a), it should have been permitted to intervene under 24(b) (1) or (2). An appeal lies where, as here, there was an unreasonable refusal of permission to intervene.

III. The suggestion, now made in opposition, that the motion to intervene was not timely is not supported by the record, and, moreover, is not available to National.

IV. The case is not moot.

Designation of Parts of the Record Considered Unnecessary
To the Clerk:

In printing the record, kindly omit from the typewritten transcript:

(a) Appearances on cover of transcript of record (as these appear on p. 42).

[fol. 140] (b) Pp. 92-102, both inclusive (comprising opening statement on behalf of National and on behalf of the Government and further statement on behalf of National).

(c) Pp. 103-114 (testimony on direct of Ralph C. Allen called as a witness on behalf of the Government, 104-106, cross examination by National, 106-114).

P. 112 is a duplication of p. 111.

(d) Pp. 114-136, excepting paragraph beginning bot. p. 115, "and I might interpolate here, your Honor" and ending on p. 116 "any deficiencies with respect to presentation" (argument of Mr. Moyer on behalf of the Government).

(e) P. 148 (entry of November 16, 1943, overruling motion for leave to intervene, as this is a duplication of the same entry appearing on p. 22 of the transcript).

Murray Seasongood, Counsel for Appellant, Allen Calculators, Inc.

Service of copy of the above statement of points and designation of parts of record considered unnecessary is acknowledged this 8th day of January, 1944.

Joseph S. Graydon, Graydon, Head & Ritchey, Counsel for Appellee, The National Cash Register Company. Calvin Crawford, United States Attorney, Southern District of Ohio, Western Division, for the United States.

[fol. 140a] [File endorsement omitted.]

[fol. 141] SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED
—Filed January 17, 1944

To the Clerk:

In printing the record in this cause, please include the entire typewritten transcript other than the appearances on the cover thereof; that is to say, specifically include the parts of said typewritten transcript which appellant, Allen Calculators, Incorporated, designated to be omitted, to wit:

- (a) Pages 92-102.
- (b) Pages 103-114.
- (c) Pages 114-136.
- (d) Page 148.

Garrard Winston, Joseph S. Graydon, Counsel for Appellee, The National Cash Register Company.

Service of copy of the above Designation is acknowledged this 13th day of January 1944.

Murray Seasongood, Counsel for Allen Calculators, Incorporated. Calvin Crawford, United States Attorney, Southern District of Ohio, Western Division.

[fol. 141a] [File endorsement omitted.]

[fol. 142] SUPREME COURT OF THE UNITED STATES**ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION
OF JURISDICTION—Filed February 7, 1944**

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing on the merits, and the case is transferred to the summary docket.

The Chief Justice took no part in the consideration or decision of this question.

Endorsed on Cover: File No. 48,085 Southern Ohio, D. C. U. S., Term No. 592. Allen Calculators, Inc., Appellant, vs. The National Cash Register Company and The United States of America. Filed January 10, 1944. Term No. 592 O. T. 1943.



FILE COPY

JAN 10 1941

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

vs.

**THE NATIONAL CASH REGISTER COMPANY AND
THE UNITED STATES OF AMERICA.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF OHIO.**

STATEMENT AS TO JURISDICTION.

**MURRAY SEABOOGOOD,
FRANK R. BRUCE,
Counsel for Appellant.**

**PAXTON & SEABOOGOOD,
SCHWYER & MILLER,
Of Counsel.**

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**IN THE DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION**

IN EQUITY No. 6802.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

THE NATIONAL CASH REGISTER COMPANY, ET AL.,
Defendants.

FILED DECEMBER 4, 1943.

JURISDICTIONAL STATEMENT.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Allen Calculators, Inc. submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the District Court entered in this cause on November 16, 1943, denying the motion of Allen Calculators, Inc. for leave to intervene. The petition for appeal was filed on December 4, 1943, and is presented to the District Court herewith, to-wit, on the 4th day of December, 1943.

Jurisdiction.

The jurisdiction of the Supreme Court to review by direct appeal the order and judgment entered in this cause is conferred by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. sec. 345, commonly known as Sec. 238 of the

Judicial Code, as amended, and by the Act of February 11, 1903, 32 Stat. 823 (as amended by the Act of March 3, 1911, 36 Stat. 1167), 15 U. S. C. Sec. 29, commonly known as the Expediting Act.

The Issues and Ruling Below.

On December 4, 1911, the United States filed an action in equity against The National Cash Register Company and various other defendants requesting an injunction against certain violations of Sections 1 and 2 of the Sherman Anti-Trust Act. On February 1, 1916, a consent decree was entered in the case, wherein the Court found that the various defendants had combined to restrain and had attempted to monopolize interstate and foreign commerce in cash registers in violation of Sections 1 and 2 of the Sherman Anti-Trust Act. Among other things, the decree enjoined The National Cash Register Company and the other defendants:

“Second . . .

“(p) From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce; Provided, that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right.”

Said decree further provided:

"Third. That jurisdiction of this cause be and is hereby retained for the purpose of enforcing this decree, and for the purpose of enabling the parties to apply to the Court for modification hereof if it be hereafter shown to the satisfaction of the Court that by reason of changed conditions or changes in the statute law of the United States the provisions hereof have become inappropriate or inadequate to maintain competitive conditions in interstate or foreign trade in cash registers or other registering devices in the United States, or have become unduly oppressive to the defendants and are no longer necessary to secure or maintain competitive conditions in such interstate and foreign trade."

On August 20, 1943, The National Cash Register Company filed a petition in the same case, pursuant to paragraph Second (p) of the Decree, asking permission to acquire a controlling stock interest in Allen-Wales Adding Machine Corporation. The latter company manufactures cash drawer machines, accounting machines and adding machines. An answer was filed to this petition by the United States requesting that the petition of The National Cash Register Company be denied. This answer was not filed until November 11, 1943. The contract, subject to court approval, between The National Cash Register Company and Allen-Wales Adding Machine Corporation for stock acquisition was not attached either to the petition of the former or the answer of the Government, and this petitioner had no opportunity to examine it before or when it was introduced at the hearing of the petition for modification of the decree.

On November 15, 1943; the date set by the Court for a hearing on said petition and answer, Allen Calculators, Inc., petitioner herein, at the outset of the proceedings, moved for

leave to intervene and submitted a proposed answer with a notice of hearing, together with a proposed order allowing intervention, which had been served on counsel for The National Cash Register Company and the Government.

Allen Calculators, Inc. alleged that it was engaged in the production of adding machines, bookkeeping machines, statement machines, calculators and cash register combinations for interstate and foreign commerce and that the proposed acquisition by The National Cash Register Company of control of Allen-Wales Adding Machine Corporation would materially and unreasonably restrain interstate and foreign commerce in such articles and tend to create a monopoly in The National Cash Register Company in respect to such articles. The proposed answer requested that the petition of The National Cash Register Company be denied.

The National Cash Register Company objected to this petitioner being allowed to intervene on the ground that the suit was between the United States and The National Cash Register Company, that there was nothing the United States could not raise and was not prepared to raise and that counsel did not see where Allen Calculators, Inc. had any standing as a party to the suit. The Government, through the special assistant to the Attorney General, made no objection to Allen Calculators, Inc. intervening in the case. In fact, it urged in open court the motion for leave to intervene be granted.

The Court thereupon granted Allen Calculators, Inc. leave to intervene and to file its intervening answer conditionally. Thereupon opening statements were made, by their counsel, on behalf of The National Cash Register Company, the Government and the conditional or tentative intervener, Allen Calculators, Inc. Counsel for the last named stated that his client was an independent dealer and it was thought the position of the independent dealer could be

well presented by it and by its president in particular; that client feared the proposed acquisition would be destructive of the business of Allen Calculators, Inc., and that Allen-Wales was in direct competition with National in respect of a "cash register or other registering device" within the meaning of the decree; also, that Allen-Wales was engaged in the manufacture of accounting or bookkeeping machines which acquisition would not "supplement the plant, patents, machines, or facilities of the defendant corporation" because Cash already had such accounting machines; also, that the product of the independents, including Allen Calculators and Allen-Wales, was sold through the dealer system and that the introduction of the agent system in competition by National Cash would be destructive of competition. At a later point, counsel for the proposed intervener called the Court's attention to Section 16 of the Clayton Act (Act of October 15, 1914, c. 323, sec. 16, 38 Stat. 730, 737), and its pertinency to the right of his client to intervene. But later, on November 15, 1943, although counsel for the Government argued that the application to intervene should be allowed, the Court withdrew the leave previously given to intervene conditionally and refused to permit intervention. The Court rendered no written opinion; it stated, in substance, the ground for its action was that the relief requested by The National Cash Register Company's petition affected a decree theretofore entered in the case and that the only parties involved in such controversy were the Government and The National Cash Register Company. A proposed order reciting that intervention was denied on such grounds, was presented by counsel for Allen Calculators, Inc., but this proposed order was refused by the Court which entered an order on November 16, 1943, overruling the motion to intervene without stating the grounds therefor. A copy of the order is attached.

Questions Are Substantial.

The consent decree of February 1, 1916, did not order the dissolution of the monopoly of The National Cash Register Company in the cash register field. That monopoly continues today largely as it did when the consent decree was entered. The decree, however, enjoins The National Cash Register Company from numerous practices, including the acquisition of competitive businesses, and was largely designed to protect competitors engaged in the manufacture or sale of cash registers or other registering devices in their right to compete with the monopoly established by The National Cash Register Company without interference by it.

Allen Calculators, Inc., while not specifically named in the decree, is within the class whose rights are thus protected by the decree. It is only by virtue of the consent decree and the continuance in full force and effect of all its provisions that smaller manufacturers have any chance of entering or continuing in the field largely monopolized by The National Cash Register Company. Consequently, the decree in a very practical way constitutes an essential safe-guard of the business of any small competitor of The National Cash Register Company, and any such competitor has a vital, direct and pecuniary interest in any application to modify the decree which might result in lessening the protection which it now affords to smaller competitors.

In cases involving proposed modifications of consent decrees in Anti-Trust suits, the Supreme Court of the United States has upheld and approved the right of competitors, whose interest might be affected, to intervene. In *U. S. v. Swift & Co.*, 286 U. S. 106, the defendant requested the modification of a consent decree by removal of a restraint which prohibited the defendant from engaging in the grocery business. The court below granted the application. American Wholesale Grocers Association and National Whole-

sale Grocers Association, which had been permitted to intervene in the court below, filed a separate appeal to the Supreme Court from this decree. The United States also appealed. The Supreme Court said, among other things, at pages 117-118:

"We have said that the defendants are still in a position, even when acting separately, to starve out weaker rivals, or at least that the fear of such abuses, if rational in 1920, is still rational today. * * * Size and past aggressions induced the fear in 1920 that the defendants, if permitted to deal in groceries, would drive their rivals to the wall. Size and past aggressions leave the fear unmoved today. Changes there have been that reduce the likelihood of a monopoly in the business of the sale of meats, but none that bear significantly upon the old-time abuses in the sale of other foods. The question is not whether a modification as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. *The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect.* (Italics ours.)

In *Pipe Line Co. v. U. S.*, 312 U. S. 502, the defendants sought modifications of a consent decree in an anti-trust suit. The suit had principally involved the claim by the Government that Columbia Gas & Electric Corporation and corporations which it controlled had unlawfully interfered with and stifled the competition of the Panhandle Company. The decree, by one of its paragraphs, specifically enjoined interference by the defendant with Panhandle with relation to certain financial arrangements, and provided that Panhandle, upon proper application, might become a party to the suit for the limited purpose of enforcing the rights conferred by Section IV of the decree. On the application to modify, Panhandle sought to intervene, and intervention was denied by the court. Panhandle appealed directly to

the Supreme Court from this order denying intervention. The court held that the order refusing intervention was a final order since it denied to Panhandle the protection secured to it by the decree and, therefore, Panhandle had the right to appeal from this order. The Supreme Court, reversing the lower court, said (p. 506):

"Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the District Court's discretion."

"That is the present case. Panhandle's right to economic independence was at the heart of the controversy. An important aspect of that independence was the extension of its operations to permit sales in Detroit. The assurance of this extension was deemed so vital that it was safeguarded by explicit provisions in the decree."

While it is true that in the *Pipe Line* case the decree itself provided that Panhandle might intervene to protect its rights in the decree, it would seem that the case does not rest in principle upon this narrow ground alone. It is believed that this case stands for the broader proposition that where a consent decree in an anti-trust suit is specifically designed to protect the economic independence of persons not parties to the suit, it is appropriate that they be given the right to intervene to protect the interests thus intended to be safeguarded, and that such intervention should be granted as a matter of right. The determinative factor is not so much whether the decree specifically provides for intervention, but is rather whether the decree is

specifically designed to protect the economic interests of the party who seeks to intervene in order to secure the protection thus intended to be afforded to him. See, also, *U. S. v. St. Louis Terminal*, 236 U. S. 194, 199.

The Federal Rules of Civil Procedure, in Rule 24, governing intervention; provide, in part, as follows:

“(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

“(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

“(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought”

Allen Calculators, Inc. was entitled to intervene as a matter of right under subsection (a) (2) of Rule 24. It not only has a vital interest in the proceedings but it will or may be bound by the decree, both as a practical matter and as a

matter of law, and its interest might not be, under the circumstances, adequately presented.

If the District Court should permit the acquisition of control of Allen-Wales by The National Cash Register Company, principles of comity, if not of law, would preclude another court from entertaining a suit by Allen Calculators, Inc. to enjoin such acquisition. *Wabash Railroad Co. v. Adelbert College of the Western Reserve University*, 208 U. S. 609. Thus, as a practical matter, a decree permitting acquisition would be a final adjudication of the rights of Allen Calculators, Inc., without it having a day in court, even though it would be injuriously affected by such acquisition. Not being a party to the proceeding, it would have no right to appeal from an adverse decree even if erroneous. Such a result would, moreover, deprive Allen Calculators, Inc. of any possible right under Section 16 of the Clayton Act to obtain injunctive relief against the proposed acquisition. This statute, with other reasons for allowing intervention, was cited to the Court.

Nor can it be said with certainty that the interests of Allen Calculators, Inc. in keeping the decree intact for its protection were adequately presented by the Government. *Pipe Line Co. v. U. S.*, *supra*. Moreover, the Government in the present case has itself recognized the need of intervention on the part of Allen Calculators, Inc. to protect its interest and those of a class as distinguished from those of the general public. The Government not only made no objection to intervention by Allen Calculators, Inc., but, as before stated, joined in its request.

But the Government took the position, in argument, that its functions in the case were not those of an adversary, but rather that the Attorney General's duty was merely to present facts to the Court from which the Court could form its own independent conclusions. The National Cash Regis-

ter Company's petition was not, therefore, resisted by any party acting in an adversary capacity—seemingly a minimum requirement of adequate representation.

The non-adversary role that the Government assumed was reflected in the manner in which the case was tried. The Attorney General had obtained unsworn letters from about twenty-four Allen-Wales dealers in answer to a kind of questionnaire he had sent to them. The proposed intervenor had no opportunity to see these or comment on them or counterstatements by the Cash Register Company. The Court questioned the propriety of the letters as not under oath. The testimony of these dealers, had it been adduced, would have tended to establish that the proposed acquisition would materially and unreasonably restrain interstate commerce in adding machines, calculators and other devices. Yet, the Government did not call these dealers, one of them in Cincinnati, as witnesses, but merely exhibited their letters to the Court. Certainly adequate representation implies that relevant and helpful testimony available will be introduced in evidence.

When Allen Calculators, Inc. was denied intervention, it was not permitted to have its own counsel instead of Government counsel examine its president as a witness although the Government requested such permission. Thus Allen Calculators, Inc. was denied the right to see exhibits before they were introduced, to cross-examine or to call witnesses. Moreover, the Government ignored the contentions made in the opening statement on behalf of Allen Calculators, Inc. that the so-called "cash drawer" is "a cash register or other registering device" and that the proposed acquisition, in order to be permitted under the terms of paragraph Second. (p) of the decree would have to "supplement the plant of the defendant corporation" and that the acquisition of the accounting machine portion of Allen-Wales's busi-

ness would not "supplement the plant—" of Cash, since it was already fully equipped in that line.

In view of the following: the Government's request that Allen Calculators, Inc. be allowed to intervene, that this company will be bound by any decree permitting acquisition; the non-adversary role assumed by the Government and its not presenting material objections suggested in the opening statement for Allen Calculators, Inc., the denial of intervention here constitutes a final appealable order. In addition to reliance on Rule 24(a) (2), it is suggested that petitioner is entitled to intervention of right because so situated as to be adversely affected by a disposition of property, namely, the Allen-Wales stock to be acquired; in the custody of the Court, actually or constructively, within the meaning of Rule 24(a) (3).

Under the statutes above referred to; an appeal from a decree in an anti-trust proceeding must be directly to the Supreme Court. These statutes have been held to apply to appeals from orders denying leave to intervene. *U. S. v. California Co-Operative Canneries*, 279 U. S. 553. *Missouri-Kansas Pipe Line Co. v. U. S.*, 3 Cir., 1909, 108 Fed. (2d) 614, certiorari denied, *Missouri-Kansas Pipe Line Co. v. Columbia Gas & Electric Corporation*, 309 U. S. 687.

The questions presented by this case are important to the litigants and to the public. The appeal presents issues of substance which call for review by the Supreme Court.

Respectfully submitted,

MURRAY SEASONGOOD,
FRANK R. BRUCE,
Attorneys for Petitioner.

PAXTON & SEASONGOOD,
SCRIBNER & MILLER,
Of Counsel.

IN THE DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

IN EQUITY No. 6802.

THE UNITED STATES OF AMERICA,

vs.

Plaintiff,

THE NATIONAL CASH REGISTER COMPANY,
ET AL.,

Defendants.

FILED DECEMBER 10, 1943.

SUPPLEMENTAL JURISDICTIONAL STATEMENT.

Allen Calculators, Inc. files this, its supplemental jurisdictional statement as follows:

On presentation to the Court by Allen Calculators, Inc. on December 6, 1943, of its appeal papers filed December 4, 1943, and of a form of bond for costs on appeal, presentation of same having been postponed to that date at the request of the Court, and counsel for Allen Calculators, Inc. having requested the Court to fix the penalty of said bond for costs in a sum approximating two hundred and fifty dollars (\$250.00), the Court continued the hearing of the petition for appeal until December 10, 1943.

On December 7, 1943, a decree was entered by this Court in the above entitled case granting, under certain conditions contained in said decree, the prayer of the petition of The National Cash Register Company and permitting,

under such conditions, the acquisition of the controlling stock of Allen-Wales Adding Machine Corporation by The National Cash Register Company. Counsel for the United States of America and for The National Cash Register Company, the sole parties to said decree, endorsed said decree and neither of said sole parties excepted to same. Said decree adversely affects this petitioner by a disposition of property in the custody of the Court, namely, the controlling stock of Allen-Wales Adding Machine Corporation, within the meaning of the Federal Rules of Procedure, Rule 24(a) (3). By reason of the proceedings culminating in said decree of December 7, 1943, this petitioner contends it was entitled to intervene as matter of right by said Rule 24(a) (3), as well as by Rule 24(a) (2).

Respectfully submitted,

MURRAY SEASONGOOD,
FRANK R. BRUCE,
Attorneys for Petitioner.

PAXTON & SEASONGOOD,
SCRIBNER & MILLER,
Of Counsel.

APPENDIX "A".

**IN THE DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION.**

IN EQUITY No. 6802.

THE UNITED STATES OF AMERICA, *Plaintiff,*

vs.

THE NATIONAL CASH REGISTER COMPANY, et al., *Defendants.*

This cause came on to be heard at the opening of the proceedings on November 15, 1943, on the motion of Allen Calculators, Inc. for leave to intervene and to file an answer attached to said motion, copies of which motion and answer had been served on the United States Attorney General and the attorney for National Cash Register Company, and such motion was argued by counsel for the United States, The National Cash Register Company and movant, on consideration whereof the court overrules said motion; to which ruling Allen Calculators, Inc. excepts.

CHAUNCEY B. GARVER,

JOSEPH S. GRAYDON,

Attys. for Nat'l Cash Register Co.

ELLIOTT H. MOYER,

Special Assistant to Attorney General.

M. SEASONGOOD,

FRANK R. BRUCE

for Allen Calculators, Inc.

DRUFFEL, J.

APPENDIX "B".**DISTRICT COURT OF THE UNITED STATES,
SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION.****IN EQUITY No. 6802.****FINDINGS AND ORDER—Filed December 7, 1943.****THE UNITED STATES OF AMERICA, *Plaintiff,*****vs.****THE NATIONAL CASH REGISTER COMPANY, et al., *Defendants.***

Pursuant to the requirements of paragraph Second, subdivision (p) of the decree entered in this Court and cause on February 1, 1916, this cause came on to be heard upon the petition of the National Cash Register Company, a Maryland corporation, successor in business to the National Cash Register Company, an Ohio corporation, defendant in this cause, filed herein on the 30th day of August, 1943, said petition praying for authority for the National Cash Register Company, a Maryland corporation, to purchase all or not less than 95% of the outstanding common stock, and all or not less than 50% of the outstanding preferred stock of the Allen-Wales Adding Machine Corporation, a New Jersey corporation, pursuant to a certain contract which the petitioner had entered into with certain stockholders of the Allen Wales Adding Machine Corporation, subject to the approval thereof by this Court. After consideration of said petition, the answer thereto, the evidence, and arguments of counsel, the Court finds:

1. More than 94% of the business of the Allen-Wales Adding Machine Corporation (other than the production of war materiel) has consisted of the manufacture and sale of adding machines, and the Allen-Wales Adding Machine Corporation does approximately 8% of the adding machine business in the United States.

2. The petitioner, the National Cash Register Company, except for an insignificant number of its Class 3000 accounting machines which were converted to function as adding machines, has not engaged in the manufacture or sale of adding machines while its principal competitors in the production and sale of cash registers and accounting machines are engaged in the manufacture and sale of adding machines.

3. In 1941 the Allen-Wales Adding Machine Corporation manufactured and sold 257 commercial bookkeeping machines and such sales constituted 37/10% of the total dollar volume of the Allen-Wales Adding Machine Corporation.

4. In 1941 Allen-Wales Adding Machine Corporation manufactured and sold 327 units of its combination adding and cash drawer machine and such sales constituted approximately 21/10% of its dollar volume.

5. The competition between the accounting machines and cash registers of the National Cash Register Company and the accounting machines and combination adding and cash drawer machines of the Allen-Wales Adding Machine Corporation is not substantial.

6. The business machines manufactured by the National Cash Register Company are sold and distributed through its employees operating under rules, regulations, and instructions promulgated by the National Cash Register Company.

7. The business machines produced by the Allen-Wales Adding Machine Corporation are sold and distributed extensively through distributors who own and operate their own sales agencies, and through independent dealers who operate their own businesses, in the course of which they to a substantial degree make their own determinations as to the policies and practices to be followed in the sale and distribution of business machines. The preservation of such distributors and independent dealers as competitors in the field of distribution of business machines is a matter of public interest.

8. The acquisition by the petitioner of the assets and business of the Allen-Wales Adding Machine Corporation through the purchase from certain stockholders thereof of all or part of its outstanding common stock and all or part of its outstanding preferred stock will supplement the plants, machines, and facilities of the petitioner; and such acquisition is desired by the petitioner for the purpose of supplementing its plants, machines, and facilities, and, upon compliance with the conditions set forth in said Section 9 hereof, such acquisition will not substantially lessen competition.

9. IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the petitioner, the National Cash Register Company, a Maryland corporation, be, and it is hereby, authorized and permitted to acquire the assets and business of the said The Allen-Wales Adding Machine Corporation, a New Jersey corporation, through the purchase of all or part of its outstanding common stock and all or part of its outstanding preferred stock: Provided, however, that such acquisition shall bind the National Cash Register Company to the performance of the following conditions:

A. The operations of Allen-Wales Adding Machine Corporation shall be maintained as a separate division of the National Cash Register Company, or as a separate corporation, with a complete and independent accounting system until at least January 1, 1950.

B. All existing contracts between the Allen-Wales Adding Machine Corporation and dealers and distributors of its products shall be continued in full force and effect by National Cash Register Company at least until January 1, 1950; provided that any such contract may be terminated prior to January 1, 1950: (1) with the consent of the dealer or distributor who is a party thereto, or (2) in good faith and for good cause based on substantial breach of such contract by such dealer or distributor. No termination for cause of such an existing contract shall be effective until the dealer or distributor involved has been given at least 30 days' notice of intention to terminate his distributor-

ship or dealership contract, and each such notice shall include a statement of the cause relied upon for such termination. Any such contract may be modified prior to January 1, 1950, with the consent of the dealer or distributor involved, provided, however, that any such contract may be modified or terminated prior to January 1, 1950, without the consent of the dealer or distributor involved if permitted by the terms thereof but only to the extent necessary to permit petitioner, through its regularly established agencies and representatives, to solicit sales, sell and service products of The Allen-Wales Adding Machine Corporation in territory now covered by any such contract without any obligation to pay to or share commission or discounts with any such dealer or distributor resulting from any such soliciting, selling or servicing; and provided further that, upon any such termination, the dealer or distributor involved therein shall be offered a new contract identical with his existing contract except for the elimination therefrom of any exclusive or preferred rights in the territory covered thereby, as against such soliciting, selling and servicing by regularly established agencies and representatives of the petitioner, and such new contracts shall be subject to the provisions of this Order. Nothing in this Order shall be deemed to prejudice any right which any dealer or distributor has under any existing contract.

C. Parts for repairing or servicing the products of the Allen-Wales Adding Machine Corporation shall be made available by the petitioner to the dealers and distributors of products of the Allen-Wales Adding Machine Corporation at least until January 1, 1954, for purchase or handling by such dealers and distributors.

D. The affairs of the Allen-Wales Adding Machine Corporation or the Allen-Wales Division of the National Cash Register Company, as the case may be, shall, during the periods that the provisions of this Order are operative, be conducted so as to exercise

the utmost good faith in dealing with and in making improvements and servicing information available to existing dealers and distributors of Allen-Wales products and in making Allen-Wales products, accessories, and parts available to such dealers and distributors.

E. The purpose and intent of these conditions is to assure to existing dealers and distributors of products, including adding machines, bookkeeping machines, and cash drawer machines and accessories therefor, manufactured by the Allen-Wales Adding Machine Corporation that such products will remain available to them for approximately a five-year period after the resumption of substantially normal production of business machines; and, in the event that such resumption does not occur prior to January 1, 1945, the United States of America may petition this Court for an extension of the date specified in subsections A and B above. In the event any such extension is granted, a corresponding extension shall be made in the date provided in subsection C, above.

F. No unfair or unreasonable discrimination shall be practiced against the dealers and distributors of the Allen-Wales Adding Machine Corporation in connection with the prices, terms, conditions, and procedures upon which Allen-Wales products, parts, accessories, and servicing information are, pursuant to this Order, made available to its existing dealers and distributors, and such prices, terms, conditions, and procedures shall not, directly or indirectly, unfairly or unreasonably discriminate against such dealers and distributors.

10. Jurisdiction over the matters contained in the petition and over the provisions and conditions of this Order is hereby retained for the purpose of enabling the Attorney General or the petitioner to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of

this Order, for the modification thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof. Jurisdiction is also retained for the purpose of enabling any dealer or distributor of the Allen-Wales Adding Machine Corporation to apply to this Court for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Order, or for the enforcement of compliance therewith, in relation to any matter in which such dealer or distributor has an interest.

11. For the purpose of securing compliance with this Order, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or an Assistant Attorney General, be permitted (1) access during the office hours of the petitioner, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the petitioner, relating to any matters contained in this Order; (2) without restraint or interference from the petitioner, to interview officers or employees of the petitioner, or of the Allen-Wales Adding Machine Corporation, who may have counsel present, regarding any such matters; and (3) the petitioner, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Order, provided, however, that information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, or in connection with securing compliance with this Order.

12. The terms and conditions of the final decree entered in this Court and cause on February 1, 1916, shall remain in full force and effect.

13. This order shall not be deemed to determine or adjudicate the validity of any patent owned by the petitioner or the Allen-Wales Adding Machine Corporation nor the

legality or validity of any patent license agreement or arrangement to which the petitioner or the Allen-Wales Adding Machine Corporation may be a party.

14. The costs of this proceeding shall be taxed to the petitioner.

JOHN H. DRUFFEL,
United States District Judge.

Approved as to form: .

GRAYDON, HEAD & RITCHEY,
Attorneys for Petitioner.

WENDELL BERGE,
Assistant to the Attorney General.

ERNEST S. MEYERS,
ELLIOTT H. MOYER,
*Special Assistants to the
Attorney General.*

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943, NUMBER **592**

ALLEN CALCULATORS, INC.,

Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and
THE UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM

MURRAY SEASONGOOD,

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Counsel for Appellant.

PAXTON & SEASONGOOD,

SCRIBNER & MILLER,

Of Counsel.

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Supreme Court of the United States

ALLEN CALCULATORS, INC.,

Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and
THE UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION TO DISMISS OR AFFIRM

STATEMENT

The Opinion and Entry Below

As mentioned in the jurisdictional statement (R. 138, 141),* the court rendered no written opinion when refusing appellant leave to intervene. Accordingly, in the absence of formal opinion, a narrative of what took place and of the court's rulings is submitted as a substitute. The application to intervene was made and a proposed order allowing intervention was presented (R. 90) at the opening of court (R. 43). The "Statement on Behalf of Appellee, The National Cash Register Company, Opposing Jurisdiction" (R. 151, 163 bot.) admits that the service of the papers "was within a half hour of the opening of court on No-

* Record references are to the typewritten transcript filed in this Court.

ember 15, 1943." The transcript (R. 43, 44) shows the following:

"The Court: What is the name of your client?

"Mr. Seasongood: Allen Calculators, Incorporated; and we have, your Honor, answer and application to intervene which we would like to file. We have given copies to both the Cash Register and the Government.

"Mr. Graydon: We very strongly object. This is a suit between the United States and the National Cash Register Company. We have just seen this answer. There isn't anything that the United States can't raise and isn't prepared to raise, but we don't see where this company has any standing as a party to this suit.

"Mr. Meyers: Your Honor, the Government has no objection to the Allen Calculators Company's application to intervene in this, because we feel that the federal rule is specifically Rule 24(b)(2), which supports an application to intervene at this time.

"The Court: It is at least accepted conditionally at this time, to save time.

"Mr. Graydon: All right.

"Mr. Seasongood: We have an order permitting it to be filed.

"The Court: Conditionally filed at this time.

"Mr. Graydon: Note objection and exception of The National Cash Register Company."

After opening statements had been made on behalf of The National Cash Register Company (which will be referred to as "National") and on behalf of the Government, appellant's counsel was also permitted to make an opening statement on behalf of his client which the court had "conditionally or tentatively allowed to intervene" (R. 45) and was permitted to state somewhat the reasons for intervention. The court said (R. 48-49):

"Just a thought, you know. There are occasions when you have a right to intervene and file a brief, but here is a proceeding between two private parties

and you are a competitor and of course you may not like it, but what I wanted to do is to get your views and then between tonight and tomorrow to have any authorities to support your position. Do you have any objection to the case proceeding today between the Government and The National Cash Register Company and you just sit by and then——

“Mr. Seasongood: ——I think this, your Honor——of course, we want to cross-examine, have the opportunity to cross-examine.

“The Court: I will tell you—you see, you can advise with the Government and assist them in bringing out any points that you think will be helpful, but it just seems a little unusual in a matter between two private parties here, in which the Government intervenes, that you come in. I thought if you had some authorities——

“Mr. Seasongood: ——Of course, we will supply the authorities, but that is true of any intervention. Intervention is always where somebody who is not a party to the original suit asks to come in and is permitted to come in because he has a special interest. We think we have a special interest, and it does seem to me that where the Government, who is the moving party, has no objection, that the person who is proceeded against is not the one to say whether they should be permitted to intervene if the Government has no objection, and they said they didn't.”

The transcript further shows (R. 49) one of the Government counsel, Mr. Meyers, then asked if the court would hear him and, upon the request being granted, said (R. 49):

• “Mr. Meyers: Your Honor, I merely wanted to comment on the application for intervention, if you will hear me on it.

“The Court: All right. It seems to me this is unusual.

“Mr. Meyers: I think the unusual character of this application is due to the fact that this is a decree matter and not a case of first impression. However, under

the rules of civil procedure it seems clear to me that the application should be granted where the applicant for intervention has a claim or defense in common, providing that certain procedural aspects of the application are taken care of, such as time, and that the intervention will not unduly prejudice or delay the rights of the parties involved. I think the application in this case meets the two conditions. It think it meets the substantive condition. That is, the applicant having a claim or defense in common with that of the Government, I think it is to the interest of the applicant that he preserve whatever rights he may have in this litigation because of two situations: (1) There is a matter of private litigation going on between Allen-Wales and Allen Calculators. In that the Government has no interest, but I can see the applicant would like to preserve whatever rights he has in that litigation in this action. (2) He has a claim, in my judgment, in common with the Government, to see that the retail level of distribution is not wiped out, diminished, by the petitioner in this cause, because such elimination of competition at the retail level, in the Government's opinion, would eliminate competition on the manufacturing level. That is the last vestige of competition that is remaining among independent manufacturers. So we do believe that the applicant here has a meritorious application to present to the Court, if the Court wants it.

"The Court: Does the Government concede that Allen-Wales is one of nine manufacturers manufacturing the same type of machine and, assuming that eventually, if the deal went through, it would be approved by the upper courts, wouldn't there be eight doing the same line of business?

"Mr. Meyers: I would like to defer to my associate on that. He has the figures.

"The Court: I just want to know whether that is the fact.

"Mr. Seasongood: We deny that.

"The Court: That is all I want to know."

Then, counsel for National asked leave to hand up a stipulation for filing with the approval of the Government. Counsel for appellant stated he would like to see it (R. 50 bot.) and suggested that the rights of appellant should be "preserved as to everything that is offered that they have stipulated."

"The Court: Without opening your mouth you have an exception to everything that takes place here" (R. 51).

"The stipulation so offered is made part of this record, marked PETITIONER'S EXHIBIT No. 1.

"Mr. Seasongood: Your Honor, may I make just one more suggestion as to our right to intervene?

"Mr. Graydon: I don't think we want to hear this.

"Mr. Seasongood: I think this would convince the Court—at least, I hope it would.

"The Court: Is it going to take just a minute?

"Mr. Seasongood: Just a minute, your Honor. Section 16 of the Clayton Act expressly authorizes any corporation to have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws. If we would sue to enjoin this going through, the United States would have to intervene and we would have this all over again in another litigation, and it seems to me that makes it clear we have the right to intervene.

"Mr. Graydon: That may be clear, but the question is, who is running this case? Is this the Government's case or your case?

"Mr. Seasongood: Any intervention has to be in subordination to the main person.

"Mr. Graydon: If you think it is sufficiently subordinated, that is all right.

"The Court: This is a proceeding to permit the purchase of this company by modification of the decree of this Court. We must not lose sight of that. I think later along we can consider the matter of intervention. . . ." (R. 51-52.)

When a chart purporting to show sales of adding machines in 1941 was offered (R. 52), the following occurred (R. 52 bot. 53):

"Mr. Garver: This chart, your Honor, shows in 1941 the total sales of adding machines were \$31,822,000.

"Mr. Seasongood: So far as this represents the R. C. Allen Company this is incorrect.

"The Court: It is correct?

"Mr. Seasongood: It is incorrect. According to Mr. Allen, the figure is incorrect.

"Mr. Graydon: Do you want to correct it?

"Mr. Seasongood: Sure. I want to come in to see that it is corrected."

A recess until afternoon was then taken:

Counsel for the Government (R. 56) asked if appellant's status would permit them to put their Mr. Allen on and asked (R. 57):

"Mr. Moyer: What is the status of the intervenor at this time?

"The Court: I would say that the intervention was received conditionally this morning, and I don't see anything that developed here. This is an original proceeding by the United States against the National Cash Register Company, and we are passing on the decree which grew out of the litigation at that time between those parties. I think it would be unreasonable at this time to—

"Mr. Moyer: —I will call Mr. Allen. . . .

"Mr. Seasongood: I understand your Honor rules we are not permitted to intervene.

"The Court: Yes. As I say, the original proceeding was between the United States Government and the National Cash Register Company, and we are just considering the decree growing out of that litigation, and it would be unreasonable at this late date to permit intervention by your client. So you may have an

exception and take such other position as you would want to, and if you later want to file a brief as a friend of the Court I don't see that there is any objection to that.

"Mr. Seasongood: Of course, we haven't had the right to cross-examine or any of the rights of a litigant in the case."

At the opening of the session on November 16, 1943, appellant presented an entry which was satisfactory to the Government (R. 58), showing the court overruled the motion to intervene

"upon the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered therein and the only parties involved in such controversy are the Government of the United States and the National Cash Register Company."

Counsel for National objected to such entry and then suggested various supposed grounds upon which the application to intervene might have been denied. The controversy relating to the entry is set out at R. 58-62.

It appears from the foregoing that, at the time the application to intervene was made, the Government considered it timely and appropriate and no objection was made by National except that, as this was a suit between the United States and National and there was nothing the United States could not raise and was not prepared to raise, appellant had no standing as a party to the suit; that the court allowed tentative intervention and was to afford opportunity for the presenting of authorities at the end of the day, but later in the same day, without having afforded opportunity for submission of authorities, refused intervention for the reason advanced by counsel for National. As was stated by counsel for appellant to the court (R. 59), if a suggestion of untimeliness had been

made by National when the application to intervene was presented, the suggestion could and would have been refused; but none such was made. The only objection was that appellant had no status that permitted it to intervene. That was the ground and the sole ground on which the court refused intervention.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked

This appears in the jurisdictional statement (R. 138) filed December 4, 1943, and in the supplemental jurisdictional statement filed December 10, 1943 (R. 149). 15 U. S. C., Sec. 29, referred to in the former, reads:

"In every suit in equity brought in any district court of the United States under sections 1-7 or 15 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court. . . ."

Section 16 of the Clayton Act reads: •

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws. . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate a preliminary injunction may issue. . . . Oct. 15, 1914, c. 323, Sec. 16, 38 Stat. 737."

Concise Statement of the Case

Appellant had a special interest, individually and as representative of the class of independent dealers, in seeking to resist the relief sought by National.

The proposed answer of appellant (R. 78, 79-80) in paragraphs 3 and 4 shows that the basic principles underlying the cash register, the adding machine and other articles are substantially the same and that the manufacturing facilities and personnel of National are adequate to manufacture adding machines. It shows, paragraph 5 (R. 80, bot. 81), that National purposes withdrawing the Allen-Wales manufacturing plant from Ithaca, New York, and integrating it into its own plant in Dayton, thereby disturbing the relationship of some four hundred employees in the Ithaca plant, etc. (Nothing relating to that appears in the Government's answer, R. 18-21.)

Paragraph 11 (R. 83) of the answer shows that

"the so-called adding machine-cash drawer combination units have mounted to a total in excess of 12,000 per annum"—

business not secured by National, but if there is a purchase of Allen-Wales it would make National

"a formidable competitor against all independents, who will have reason to fear their competition."

Paragraph 12 shows that after the decree of February, 1916, Remington, a formidable competitor in the cash register field, had, after bitter competition, to sell out to National.

Paragraph 15 (R. 84-5) shows the method of doing business of the independent dealers.

Paragraph 20 (R. 87) shows the particular hardship which would result to appellant from permitting National to market under the Allen-Wales name, because of the name

"Allen" and resulting confusion. It is also noted there that Mr. Allen "claims an interest in the Allen-Wales company through litigation which is now pending."

Paragraph 22 contains certain direct denials of allegations in the petition not clearly denied in the Government's answer (R. 18-21).

Not alone did the proposed answer show special interest and reasons for permitting appellant to intervene, but the so-called opening statement made on its behalf (R. 45) and the reference to Section 16 of the Clayton Act (R. 51) also showed grounds for permitting intervention. Attention of the court was attracted to that portion of Second (p) of the decree which enjoined National from acquiring stock ownership of

"any competitor engaged in the manufacture or sale of cash registers or other registering devices. . . ."

and that Allen-Wales was such. It was further contended Allen Calculators manufactures a cash register and is in direct competition with National; National might refer to it as a cash drawer or something else but that, in fact, it was a "cash register or other registering device." The pertinency of a finding of guilt, even by consent (R. 46), would have been elaborated with authorities of this court had appellant been permitted, as it was not, to develop this aspect of the case. So, of the point that as the National already has bookkeeping or accounting machines, they would not need this purchase "to supplement the plant." It was stated also that the method of doing business of competitors, Allen Calculators and other independents would be developed and that appellant would be affected by the decree (R. 47) and had a special aptitude for presenting the position of the independent dealer; also that its application to intervene was in subordination to the Government position and that somewhat similar interven-

tion had been allowed in other cases. The right of appellant to intervene under Section 16 of the Clayton Act was also impressed upon the court (R. 51-2).

It is true that the answer of the Government ends with a request that the petition be denied (R. 21), but counsel for the Government, in his closing argument, said (R. 64):

“And I might interpolate here, your Honor, that I have not regarded this proceeding, and I don’t believe proceedings under this decree are properly regarded as an adversary proceeding between the Government and the National Cash Register Company. Rather, the Court is charged under this decree with determining the scope of the investigation and all the circumstances, and we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act. And I might say at this time that if the Court believes that we have been deficient in providing the Court a full picture of all the circumstances, if the investigation doesn’t cover what the Court believes it is charged with doing upon its investigation, we will gladly undertake to supply any deficiencies with respect to presentation.”

The Government had sent out a form letter or questionnaire (R. 70-71) to a number of Allen-Wales distributors and had received answers from twenty-two, of which three sample copies from Bakersfield, California (R. 72), Charlotte, North Carolina (R. 73), and Boston, Massachusetts (R. 74-75), appear in the transcript.

The stipulation (R. 66-69) handed to the court on the afternoon of November 15, 1943 (R. 53), provides (R. 68):

“IV. The Attorney General has written a form letter to certain of the present dealers and distributors of Allen-Wales adding machines and has received letters from some of them in reply. A copy of the said letter written by the Attorney General, and the replies

received thereto, may be presented to the Court at the hearing for its inspection. No objection thereto will be made by the petitioner on the ground of hearsay or incompetency; but the petitioner reserves the right to object to the same on the ground of irrelevancy and immateriality, and to comment on the value of such letters as evidence because of lack of opportunity for cross-examination, and in so far as they may contain expressions of opinion. The same shall apply to any letters written by the petitioner or by the Allen-Wales Adding Machine Corporation to Allen-Wales dealers and distributors and to any replies received thereto."

The questionnaire and replies received from twenty-two dealers were offered under the stipulation "for the inspection of the court," Government counsel saying:

"The stipulation provides that this is offered for inspection by the court and also that National's counsel can offer any comments on the communications that they desire to."

The transcript shows (R. 53-4) that thereupon the whole matter before the court was narrowed, actually or tacitly, by the parties to the question whether the proposed purchase would substantially lessen competition, and the argument and proof that appellant would have adduced, as outlined in its opening statement, including that any permitted purchase must supplement the plant, was not treated as an issue. The court said (R. 55 bot. 56):

"Well, I question the propriety of the letters, and your position is not under oath, and I say I will receive it conditionally, just to enable you to make up the record, so if the Court of Appeals wants to have anything to do with it, it will be before them. . . .

"Mr. Moyer: This is covered by the stipulation. Under existing conditions we did not want to subpoena in forty or fifty dealers. The statements are before the Court under the stipulation, and any comment National wishes to make on them—

"The Court: —For practical purposes let us let them in.

"The folder referred to, containing photostatic copies of statements by dealers of Allen-Wales Adding Machine Corporation, is made part of this record as GOVERNMENT'S EXHIBIT NO. 105.

"Mr. Garver: This memorandum, which is prepared by Allen-Wales Company, which we would like to submit with the letters, contains a list of all of their sales dealers and distributors. It gives the date when each started in business, it gives the date when they made a contract with Allen-Wales, and it contains information from their own letterheads and from Dun and Bradstreet as to what business they are in.

"The Court: Let the Government put theirs in.

"Mr. Moyer: We are also offering communications received from each of the manufacturers of adding machines, giving an outline of the distribution systems.

"The folder referred to, marked 'Adding Machine Distribution Systems,' is made part of this record as GOVERNMENT'S EXHIBIT NO. 106."

Specification of Assigned Errors Intended to Be Urged

All of the three assignments of error (R. 31) are intended to be urged, namely, (1) overruling motion for leave to intervene, (2) withdrawing leave to intervene conditionally, (3) failing to enter order in conformity with decision in refusing leave to intervene.

SUMMARY OF ARGUMENT

In opposition to a motion to dismiss or affirm, a showing of probable jurisdiction and that the questions presented by the appeal are substantial is enough. The appeal involves the right of a private concern, specially affected, to intervene, with the Government's consent, in support of the Government's opposition to the modification of a consent injunction in an anti-trust suit.

The decree of February, 1916, sought by National to be modified was entered against it following convictions of its officers and agents in a criminal proceeding for violation of the anti-trust laws, which was reversed with directions to award a new trial. *Patterson v. United States*, 222 Fed. 599 (C. C. A. 6, 1915), pp. 633, 634, 637, 639, 643, 650. It was there charged that National (pp. 611t, 623, 625) did from 80 to 95 per cent of the manufacturing and selling of cash registers. The proposed answer of appellant (R. 78, 80 bot., par. 5, 83, par. 12) set up that National still exercises predominant control in its field. This opinion in the criminal case refers to evidence of the most flagrant character of illegal acts utilized for the ruthless suppression of competition. The final decree sought to be modified enjoins a great number of such acts. Second (p) (R. 5) enjoins National from acquiring ownership or control by means of stock ownership of the whole or an essential part of the business of any competitor engaged in the manufacture or sale of cash registers or other registering devices, but provides in case any such acquisition is desired a petition may be presented to the court, which the court may allow. The paragraph Third (R. 5) of the decree is a usual one in anti-trust injunction cases. It retains jurisdiction of the cause for the purpose of enforcing the decree and of enabling the parties to apply to the court for modification.

By this decree, the court assumed control of the stock of all competing corporations so far as might concern acquisition of stock of any of them by National and, in effect, placed the "disposition of property in the custody of the court" within the meaning of Rule 24(a)(3) relating to intervention of right. The decree was intended for the protection of the public and of competitors. It is to be read in the light of the illegal acts found and enjoined. Even without the reservations in the decree, only the court which passed the decree had jurisdiction to modify it and to con-

sider whether it should be modified. The jurisdiction of the court which entered the decree to modify it is, therefore, just as exclusive as if the case had been a suit in rem or quasi in rem. No court has power to modify the decree of another court.

The decree gave appellant and independents generally doing business under the dealer system and competing with National, rights additional to such as are accorded them under the Sherman and Clayton Acts: it provided, for example, a proposed acquisition must supplement the plant, must be for that purpose and dealt not only with cash registers but any other registering device. Thus it was more stringent than the requirements of the anti-trust laws. It would not necessarily be a violation of the anti-trust laws to acquire property which would not supplement the plant of the acquirer. The decree, however, prohibits such acquisition.

Appellant could not assert its rights in any other court. As before stated, it could not ask, with success, any other court to interfere with the discretion of the court which entered the decree to modify it. It could not sue under the Clayton Act in any other court, because that Act only gives a remedy against threatened violations. Here the violations had been enjoined. As the Clayton Act does give a remedy to prevent injury, inferentially it, as "a statute of the United States confers an unconditional right to intervention" within the meaning of Rule 24(a)(1). Should the court modify the decree and permit acquisition, appellant's rights to protection would then be lost, if it were assumed these could have been asked of some other court. The contract for acquisition was signed subject to the court's approval. This being given would thus constitute a completed transaction. The Clayton Act (Sec. 16) does not relieve against completed transactions but only against threatened injury from actions to be taken. *Fleitman v. Welsbach Street Lighting Co.*, 240 U. S. 27 (1916).

Moreover, as a practical proposition, any other court than that in which the decree was passed would, if the hurdle of interfering with the decree of another court were surmounted, deny relief on some theory such as that the suitor was precluded by representation of the United States through the decree in the principal case; *Wyoming v. Colorado*, 286 U. S. 494, 508-9, or on principles of comity or *stare decisis*, or by exercising its discretion not to award equitable relief. To permit intervention under Rule 24(a) (2), it is not necessary to show conclusively that the representation of applicant's interest by existing parties is inadequate and the applicant is bound by a judgment in the action: a showing that the representation "may be inadequate" and that applicant "may be bound" by the judgment suffices.

Invoking Rule 24(a)(2) is not intended as a reflection on Government counsel. They, themselves, it would seem, recognized that the representation of the applicant's interest by existing parties might be inadequate, since they not only made no objection to intervention but argued in favor of permitting it. Not all points mentioned in appellant's opening statement and which would have been presented had intervention been allowed, were noticed or developed at the hearing.

Also, as the decree of 1916 followed extensive and serious violations of law and was entered at the instance of the United States, a modification of the decree to permit acquisition and lessen competition should have been permitted, if at all, only after the fullest presentation of the facts to the court and not in the shape of informal communications presented to the court for its "inspection," especially after the court expressed disapproval of the letters as evidence. A witness in Cincinnati might have been produced without undue inconvenience and as to the others, if it was not desired to produce such as were not

too far distant, the depositions of all Allen-Wales dealers might have been taken by the Government upon oral examination or upon written interrogatories.

The United States was certainly in an adversary position when it prosecuted National criminally and enjoined it. Why this adversary position should disappear on a petition for modification and the Department in effect be transformed into a commissioner (R. 64) is not apparent. It is a question whether the Government, after having assumed such non-adversary position, would not have lost its right of appeal from any decree which might be entered.

Rule 24 is to be liberally construed. In the problems of anti-trust enforcement, judges should be "willing to hear from more than the conventional parties in an adversary procedure" and should "accept economic testimony appropriate for laying down a broad rule of industrial government . . ." and "... frame decrees suited to the character of the many dimensions of the problem revealed." *Crosby Steam Gauge, etc., Co. v. Manning et al., Inc.*, 51 F. Supp. 972, 974 (1943), Wyzanski, J.

Cases cited by opponents before adoption of the Federal Rules of Civil Procedure are distinguishable. Rule 24 amplified the right to intervention (notes of the Committee published by Government Printing Office, Document 101, p. 243), and "should be construed with great liberality." *Western States Machinery Co. v. S. S. Hepworth Co.*, 2 F. R. D. 145, 146. The rule dispenses with the requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. *Securities Commission v. United States Realty Co.*, 310 U. S. 434, 459 (1940).

The refusal of leave to intervene in this case is appealable to this court. First, it is a final judgment in an anti-trust case. It is final because appellant cannot assert its rights to prevent modification of the decree allowing ac-

quisition in any other court than that in which intervention was sought. Second, the refusal of intervention was not discretionary, since under Rule 24(a)(1), "a statute of the United States confers an unconditional right to intervene" under the circumstances of this case and the conditions for intervention of right under 24(a)(2) and (3) also exist. Third, if, contrary to the foregoing, allowance of intervention was discretionary, appeal lies from an unreasonable exercise of discretion.

The suggestion that the case has become moot because the decree was not superseded is untenable. The jurisdiction of this court is not so easily ousted. It exists whether an appeal is taken without supersedeas or with supersedeas (if it be assumed an appellant denied the right to intervention may supersede the decree to which he is not permitted to become a party). Appellant excepted to the order of November 16, 1943, refusing it leave to intervene. It filed its petition for appeal, assignment of errors and jurisdictional statement and served copies on National and the Government counsel, and requested the court to fix the bond for appeal on December 4, 1943. The court postponed the matter of allowance of appeal to December 6 and again on December 6 to December 10. The decree of December 7, allowing acquisition, was thus entered at a time when all steps which appellant could take for appeal had been taken and made a matter of record. The filing of the appeal papers constitutes a *lis pendens*. The appeal was perfected at the same term as soon as might be. When the decree of December 7 was entered, National and Allen-Wales and its stockholders had a right to proceed, but they did so at the risk that the appeal from the order refusing appellant leave to intervene would be sustained. If a case becomes moot in the absence of supersedeas, then it would follow that this court does not have jurisdiction (and, of course, it does have) to review cases appealed without supersedeas.

ARGUMENT

I Appellant Was Entitled to Intervention of Right Under Rule 24(a)(1), (2) or (3)

As to 24(a)(1), Section 16 of the Clayton Act, properly interpreted, confers an unconditional right to intervene in opposition to attempted modification of a consent anti-trust injunction. The statute confers a right to injunctive relief in a United States Court against threatened loss or damage by a violation of the anti-trust laws. It does not in terms allow intervention in the cause where an injunction granted is sought to be vacated, in part, so as to cause damage to proposed intervenor. But if there is threatened loss or damage, and the court which passed the decree is the only one having jurisdiction of the proceeding for modification, then the rights conferred by the Act must be asserted in that court. As said in *Securities and Exchange Commission v. C. M. Joiner Leasing Corporation et al.*, 64 S. Ct. 120, 123 (1943):

Courts will construe details of an act in conformity with dominating general purpose, will read text in the light of context and will interpret text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

As to 24(a)(2), the representation of the applicant's interest by the Government may have been considered by the Government itself inadequate in view of the Government's request that applicant be permitted to intervene to show its special economic interest and that of the class of dealers to which it belonged in opposition to the vacation of the injunction prohibiting acquisition. Besides, appellant tendered a showing of factors which were not presented or urged upon the court and of which the court should have had the benefit before deciding to permit ac-

quisition, or on the protective sufficiency of the conditions in the decree. The court should have been more fully apprised of the rapid growth and real competitive nature of the so-called cash drawer, for instance, and that the acquisition of Allen-Wales removed the largest of the independent competitors. Previous wrongdoing not to be ignored when size has been utilized in the past, and opportunity for abuse, and warnings against modification in *United States v. Swift et al.*, 286 U. S. 106, 116, 117 bot.-18, and the rule prescribed in that case that nothing less than a clear showing of grievous wrong should lead to change from what was decreed after years of litigation with the consent of all concerned (p. 119), were not sufficiently urged upon the court. (The wholesale grocers were allowed to intervene in that case.) See, also, *Chrysler Corp. v. United States*, 316 U. S. 556, 562.

The Government's case was informally presented by letters for "inspection" instead of valid evidence and the Government assumed a non-adversary position. So the representation of petitioner's interest may have been inadequate.

Likewise, when the court modified the decree over which it had retained jurisdiction, no other court would give relief to appellant here and it would be bound by the judgment in the action. This result would be reached by one of a number of possible theories and reasons for denying relief. A court might say that the case was *res adjudicata* because the rights of the applicant were concluded by the applicant having been represented, adequately or inadequately, by the United States. The underlying reason for denying relief in an independent action would be the rule of comity which would preclude one court from attempting to interfere with a judgment of another modifying its decree under express terms of a reservation permitting modification. In *United States v. Lane Lifeboat Co., Inc.*,

et al., 25 F. Supp. 410; 411, a suit by the United States against the Boat Company and its surety for damages because of patent infringement liability paid, the intervenor had indemnified the surety company. The court said that Rule 24 should be liberally interpreted and, although the judgment would not directly bind the petitioner, it would, in the last analysis, do so indirectly. In *United States ex rel. Skinner & Eddy Corporation v. McCarl*, 8 F. (2d) 1011 (Ct. App. D. C.), the court held that when one court has acquired jurisdiction of the subject matter of a case, no court of coordinate authority is at liberty to interfere with its action and said, pp. 1011-12:

"It is manifest that there are pending in a court of competent jurisdiction two suits involving the contracts upon which the claims submitted to the Comptroller General are based. If, as suggested by appellant, that court should be of opinion that the assignment to the United States was subject to all existing equities, and that the claim here involved is not in law a claim against the United States, notwithstanding the assignment, then there would be no necessity for the writ. But, whatever may be the decision of that court, it having acquired jurisdiction of the subject-matter of this case, no court of coordinate authority is at liberty to interfere with its action. This principle is so familiar as to require no citation of authorities."

Certiorari was granted, 270 U. S. 637, and the case was affirmed on other grounds, 275 U. S. 1.

As to 24(a)(3), while the stock of competing companies is not physically in the custody of the court, it is, by the reservations of the decree so far as relates to acquisition by National, constructively in the custody of the court and the applicant is so situated as to be adversely affected by the permitted disposition of such property. In *Wabash R. R. v. Adelbert College of the Western Reserve University*, 208 U. S. 609, on petition for rehearing and motion to

modify the judgment, leave was asked to permit the judgment of the Ohio court to stand to the extent that it would not involve interference with the constructive possession of the federal court. The request was denied. It is recognized that the rule of that case refers to exclusive jurisdiction resulting from seizure or beginning of an action looking to seizure of property. But, by liberal interpretation, there will be a disposition of property in the custody of the court when, after a court, at the instance of the public authorities, has enjoined acquisition of such property with express reservation of right to modify the decree, the court entertains an application of the party enjoined to modify its decree, and permit the disposition of such property.

II. If Appellant Was Not Entitled to Intervention of Right Under 24(a), It Should Have Been Permitted to Intervene Under 24(b)(1) or (2). An Appeal Lies Where, as Here, There Was an Unreasonable Refusal of Permission to Intervene

As to (b)(1), if Section 16 of the Clayton Act does not confer an absolute right of intervention in a case such as this, the condition of inability to assert rights under that statute in any other court confers a conditional right to intervene.

As to (b)(2), the applicant's defense and the main action have questions of law or fact in common.

The exercise of discretion by the court is reviewable by appeal in this, as in other cases, where the discretion of the court has been held to be reviewable. Thus, in *N. L. R. B. v. I. & M. Electric Co.*, 318 U. S. 9, 16, 30, it was decided that under Sec. 10(e) of the Act, an application to adduce additional evidence is addressed to the sound judicial discretion of the court and the question was said to be, did the court act arbitrarily or abuse its discretion. It was found the order was not arbitrary or unreasonable or an

abuse of discretion, but the right of review was not questioned. See, also, *Ohio Oil Co. v. Conway*, 279 U. S. 813.

In *City of New York v. New York Telephone Co.*, 261 U. S. 312, decided in 1923, before the Rules of Civil Procedure were adopted, at p. 317, the court, after reviewing previous decisions, said:

"These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, . . ."

See, also, to the same effect, *State of Washington v. U. S. et al.*, *Columbia R. Packers Ass'n. et al. v. Same*, 87 Fed. (2d) 421, 433, 434, 435, C. C. A. 9 (1936).

In *In re Engelhard & Sons Co.*, 231 U. S. 646, cited by opponent, intervention of a customer of the telephone company was allowed to permit petitioner to assert its own claim (p. 649) and with the right to renew its application when making it appear it had authority from other specifically named claimants to represent them. Cf. *Louisville Tr. Co. v. Louisville, Etc., Ry. Co.*, 174 U. S. 674, 685, 686.

The reason why a refusal of leave to intervene is usually regarded as discretionary and not final is because, in the ordinary case, denial of the application does not prejudice the applicant, who can assert his rights in another court. This is stated in *Credits Commutation Co. v. United States*, 177 U. S. 311, 315. But it is also stated (p. 315) that it is doubtless true cases may arise where the denial would be a practical denial of relief which can only be obtained by intervention, as in the instance where there is a fund in court and the refusal is not discretionary there. As we have shown, while there is not here a fund in court, there is exclusive jurisdiction regarding an acquisition of stock in the court where intervention was sought.

III. The Suggestion, Now Made in Opposition, That the Motion to Intervene Was Not Timely Is Not Supported by the Record, and, Moreover, Is Not Available to National

As previously stated, if this objection had been made, the timeliness of the motion to intervene would have been shown. Without going into the matter unduly at this time, it may be stated that the answer of the United States was not filed until Thursday, November 11 (Armistice Day), and the hearing was Monday morning, November 15. The petition to modify stated that the contract would be exhibited to the court at the hearing. It was not available to appellant for examination before the hearing. Neither was the stipulation between the Government and National. Interventions are not allowed to impeach a decree already made. *United States v. California Canneries*, 279 U. S. 553, 556. Surely, for the convenience of all parties, an application for leave to intervene is suitably made when presented at the very opening of the proceedings. The Government, in subordination to which appellant sought to intervene, urged, when the application was made, that the application met all the conditions of Rule 24 and should be granted.

However, discussion of the timeliness of the application is beside the point, since no objection was made on the ground of lack of timeliness. National's objection was made solely on the ground that appellant had no standing to intervene as a party in the controversy between the United States and itself. The court, after allowing conditional intervention, later revoked the permission and refused intervention before the time previously accorded for citation of authorities and without having the benefit of authorities (Cf. *Illinois Steel Co. v. Ramsey et al.*, *Same v. Aigler et al.*, 176 Fed. 853, 863, C. C. A. 8 [1910], where somewhat similar action was disapproved) and placed its

refusal of leave to intervene on the ground of National's objection of lack of status of a competitor to intervene. The court should have made an entry giving its reason for refusing intervention, namely, supposed lack of status to intervene, but the reason for the court's refusal is, from the record, nevertheless, patent.

IV. The Case Is Not Moot

A case may be appealed with or without supersedeas. One who acts under a decree before it becomes final and the time for appeal has elapsed, does so at his own risk. He cannot oust the jurisdiction of the appellate court by so proceeding.

CONCLUSION

It is submitted that a sufficient showing has been made in opposition to the motion to dismiss or affirm for the overruling of that motion.

Respectfully submitted,

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Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and
THE UNITED STATES OF AMERICA,

Appellees.

BRIEF FOR APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and
THE UNITED STATES OF AMERICA,

Appellees.

BRIEF FOR APPELLANT

This is an appeal by Allen Calculators, Inc., a corporation,¹ from a judgment entered November 16, 1943, in the District Court, Southern District of Ohio, Western Division, in Equity Case No. 6802, *United States of America v. National Cash Register Company*,² refusing Allen leave to intervene (R. 16).

¹ Allen Calculators, Inc., will be referred to as "Allen"; Allen-Wales Adding Machine Corporation, as "Allen-Wales."

² Referred to as "Cash."

There Is No Reported Opinion

The judge rendered no written or formal oral opinion (R. 40). He declined, though requested (R. 41), to state in the entry denying leave to intervene the ground of refusal (R. 40-3). His reason for not permitting intervention must, therefore, be deduced from the record. This will disclose that the sole basis for the refusal, after tentative intervention had been granted, was that the original controversy had culminated in an injunction decree obtained in 1916 by the United States in an anti-trust suit against Cash, which decree allowed Cash to petition for modification in certain respects; that Cash had petitioned, and so the only parties with standing in a hearing to determine whether modification should be granted, were the United States and Cash.

Concise Statement of Grounds of Jurisdiction

The jurisdiction of this Court to review by direct appeal the order and judgment entered in this cause is conferred by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C., Sec. 345, commonly known as Sec. 238 of the Judicial Code, as amended, and by the Act of February 11, 1903, 32 Stat. 823 (as amended by the Act of March 3, 1911, 36 Stat. 1167), 15 U. S. C., Sec. 29, commonly known as the Expediting Act and reading:

"In every suit in equity brought in any district court of the United States under sections 1-7 or 15 of this title, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court. . . ."

In *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502, 505, the Court interpreted the above section as permitting appeals direct from denial of motions to inter-

vene. Denial of right to intervene is "the final decree of the district court" so far as concerns the litigant denied intervention.

Statement of the Case

The court, on the morning of November 15, 1943, at the opening of court and at the outset of the hearing on Cash's petition, allowed Allen's intervening answer to be accepted conditionally and filed conditionally (R. 29-30), to which Cash excepted (R. 30 top). This was after Cash's objection, as follows:

"... We very strongly object. This is a suit between the United States and the National Cash Register Company. We have just seen this answer. There isn't anything that the United States can't raise and isn't prepared to raise, but we don't see where this company has any standing as a party to this suit."

and the Government's statement:

"Mr. Meyers: Your Honor, the Government has no objection to the Allen Calculators Company's application to intervene in this, because we feel that the federal rule is specifically Rule 24(b)(2), which supports an application to intervene at this time" (R. 29).

Opening statements were made on behalf of Cash, the Government and Allen (R. 30-34). Cash has caused to be included in this record the opening statement on behalf of Cash (R. 65-72), the opening statement for the Government (R. 72-74) and a "Further Statement on Behalf of Petitioner" (R. 74).

Counsel for Allen stated (R. 30 bot.) Allen, which the court had "conditionally or tentatively allowed to intervene," was an independent dealer, and it was thought the position of the independent dealer could be well presented

by Allen and by Mr. Allen in particular; also, Allen feared the proposed acquisition of Allen-Wales would be destructive of Allen. Attention was called (R. 31 top) to paragraph Second, subparagraph (p) of the decree (R. 5); that it forbade acquiring ownership of a competitor engaged in the business of "cash registers or other registering devices," together with the fact that Allen-Wales manufactured a cash register, or, at least, a "cash register or other registering device" and was in direct competition with Cash. The Allen-Wales cash register with an adding machine ordinarily superimposed was asserted to be a complete cash register (R. 31).

Counsel for Allen stated further, the petition to modify must be read in the light of Cash having been found guilty of illegal acts and having been enjoined from performing them, and the effect of the identical thing, referred to in a case, in this court, to be cited. (This was *United States v. Swift & Co.*, 286 U. S. 106.) Next, it was observed that under Second (p) of the decree, there could be relief only if there was no substantial diminution of competition as the result of the purchase and if the plant desired would "supplement the plant" of Cash. It was then contended (R. 32 top), that, as Cash already had accounting machines, the plant desired to be acquired would not supplement the plant or facilities of that corporation.

When it was further stated that Allen and Allen-Wales, operated through dealers and Cash on the agent system, the court asked on what theory Allen asserted there was a right to intervene (R. 32), saying it appeared a little unusual and this was a kind of a semi-Government proceeding in which the Government, on behalf of everybody, was opposing the confirmation of the sale. Counsel for Allen (R. 32 bot.) replied, intervention was proper where parties in interest would be affected by the decree and

repeated that in this case Allen was an independent dealer having particular knowledge of the effect this transaction would have upon the lessening of competition and the lessening (sic, increasing) of the interference with its own business; that the Government had no objection, that the proposed intervention was, therefore, in subordination to the Government and that, as Allen was in the field and had an opportunity to know the thing well, its position should be represented, as was permitted in the *Swift* case where, the court was told; the Grocers Association was allowed to intervene (R. 33). The court then said:

"... here is a proceeding between two private parties and you are a competitor and of course you may not like it, but what I wanted to do is to get your views and then between tonight and tomorrow to have any authorities to support your position" (R. 33).

Counsel for Allen said these would be supplied (R. 33).

Counsel for the Government then made a somewhat comprehensive argument in behalf of the intervention, stating he thought the application met the necessary procedural and substantive condition for intervention (R. 34).

Subsequently, Cash handed up for filing, with the approval of the Government, an undated stipulation (Petitioner's Exhibit 1, R. 35, 45). The following occurred (R. 35):

"Mr. Seasongood: We would like to see that.

"Mr. Meyers: It admits certain allegations in the petition that we have agreed to.

"Mr. Seasongood: Your Honor, we haven't had an opportunity to study this at all.

"The Court: Of course, as I say here, you are in here cooperating with the Government. The Government has stipulated and for the sake of saving time

we will be recessing in ten or fifteen minutes and you can see it.

"Mr. Garver: Your Honor, that is why we object to this intervention.

"The Court: We will go along. I think you have stated your position relative to the intervention.

"Mr. Seasongood: Of course, our rights will be preserved as to everything that is offered that they have stipulated.

"The Court: Without opening your mouth you have an exception to everything that takes place here.

"The stipulation so offered is made part of this record, marked *Petitioner's Exhibit No. 1.*"

Later, Section 16 of the Clayton Act was called to the court's attention by counsel for Allen as additional reason for right to intervene (R. 35-6). When a chart showing dollar value sales of adding machines in 1941 was introduced by Cash, including sales by Allen, the following transpired:

"Mr. Garver: This chart, your Honor, shows in 1941 the total sales of adding machine were \$31,822,000.

"Mr. Seasongood: So far as this represents the R. C. Allen Company this is incorrect.

"The Court: It is correct!

"Mr. Seasongood: It is incorrect. According to Mr. Allen, the figure is incorrect.

"Mr. Graydon: Do you want to correct it?

"Mr. Seasongood: Sure. I want to come in to see that it is corrected" (R. 36).

At the afternoon session (R. 37 top), after Cash had presented its witnesses and exhibits and closed its case, the Government offered no testimony by way of witness, deposition, interrogatories or otherwise, but presented a folder (id.) containing questionnaire sent by the Government to forty-three Allen-Wales dealers with twenty-two replies (R. 38 bot.)

"in support of the stipulation . . . for the inspection of the Court" (R. 37).

Government counsel added:

"The stipulation provides that this is offered for inspection by the Court, and also that National's counsel can offer any comments on the communications that they desire to." (R. 37).

Objection was made by Cash thus:

"We reserve objection to those, on the ground of materiality and relevancy. We agreed that they could be put in and examined by the Court, but we do want to register an objection to them as being immaterial and irrelevant" (R. 37).

There followed a discussion between counsel for the Government, Cash and the court, ending with the folder being

"made part of this record as Government's Exhibit No. 105" (R. 39)

as was a folder on behalf of Cash (R. 39).

The court questioned the propriety of the letters as not under oath and received them conditionally to enable the Government to make up the record (R. 39). In the colloquy relating to admissibility of the letters, Cash took the position that

"the only question before the Court is whether there is any substantial competition between the corporation which is making the purchase and the corporation which is being sold, and if the result of the acquisition would be to substantially lessen competition between those companies" (R. 37).

The court also seemed to be of this opinion (R. 37-8). The Government's form letter appears at R. 49-50; three sample letters in reply at R. 51-54.

Later, Government counsel queried if Allen's status would permit them to put their Mr. Allen on (R. 40 top) and asked:

"What is the status of the intervenor at this time?"

The court then refused intervention in language (R. 40) indicating that because the original proceeding was by the United States against Cash and the court was passing on the decree which grew out of the litigation at that time between those parties, it would be unreasonable, at the time of petitioning many years later for modification of the decree, to permit intervention by one not a party to it (R. 40).

This ended participation by Allen, which was thereafter treated as being out of the case. Allen's right to intervene was disposed of adversely without opportunity for further argument regarding such right or opportunity to furnish in support of its position authorities which, in the morning, the court had said might be furnished between adjournment in the afternoon and next day's session.

In the course of the Government's argument (R. 85-104), the court indicated rather clearly that it failed to see anywhere in the record any suggestion of restraint of trade (R. 89), and in saying it had been held, in this court,

"5% cannot be construed as substantially limiting competition" (R. 90),

seemed to be adopting Cash's theory that the test of permissibility was then existing competition between buyer and seller, notwithstanding the competition was in its incipency; that the public generally would benefit by this

acquisition (R. 91) and so the fate of the group of small dealers could not be considered. The court said (R. 95):

"If this were an original action that was unlimited it would be different, but you want again to come back to the fact that we have a decree that was entered some thirty years ago, and that is the controlling factor."

The Government, in argument, stated its position as non-adversary, thus (R. 86):

"And I might interpolate here, your Honor, that I have not regarded this proceeding, and I don't believe proceedings under this decree are properly regarded as an adversary proceeding between the Government and the National Cash Register Company. Rather, the Court is charged under this decree with determining the scope of the investigation and all the circumstances, and we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act. And I might say at this time that if the Court believes that we have been deficient in providing the Court a full picture of all the circumstances, if the investigation doesn't cover what the Court believes it is charged with doing upon its investigation, we will gladly undertake to supply any deficiencies with respect to presentation."

Again, when the court said (R. 99):

"I was just going to ask a question. Do you want to supplement this argument with a brief, in view of what has gone on here now, the suggestions that have been offered? I say, in view of the suggestions here, that is, the Government's position, that if this purchase were permitted to be consummated it would substantially lessen competition and violate the anti-trust law and the Clayton Act."

the non-adversary attitude of the Government was repeated.

"Mr. Moyer: Violate the decree. I mean I even don't like to use the language 'in violation' here. We believe that the Court should be fully and completely informed, and we are attempting to do it to the best of our available facilities and knowledge. So if the Court will——

"The Court: ——I don't see what else you could furnish. I think the statistics right down to the minute have been furnished, and I don't see what else the Government could do to add to the case.

"Mr. Moyer: We had the alternative of calling a hundred or a hundred and fifty independent distributors. We couldn't do that under the circumstances.

"The Court: Suppose you did that and the other side called ten thousand to prove they had been benefited. We would be back to where we started."

A brief was to have been filed on behalf of the Government (R. 104), but apparently the court decided to allow purchase without briefs being filed.

At the opening of the morning session on November 16, 1943, Allen presented an entry satisfactory to the Government (R. 41 top) overruling the motion to intervene

"upon the ground that the relief requested by the petition of the National Cash Register Company in the above cause affects the decree heretofore entered therein and the only parties involved in such controversy are the Government of the United States and the National Cash Register Company" (R. 41).

This was objected to by Cash and the court said:

"If you will let me read it just a moment. (After examining entry): Of course, the point about it is I wouldn't want this entry to go on because, as I say,

I gave you an opportunity to furnish authorities. Of course, you suggest the Clayton Act, but I wouldn't want this matter here to turn on that one ground alone. You can prepare an entry overruling your petition to intervene, and that is all there is to it, because we did not go into the matter fully" (R. 42).

And

"I think that the record should show that the Court does not consider this entry fair, in that it has to be bound on that one ground without going into it fully (handing document to Mr. Seasongood)" (R. 43).

Accordingly (R. 44) the ground of refusal was stricken from the entry submitted and (R. 100) the overruling order reads:

"This cause came on to be heard at the opening of the proceedings on November 15, 1943, on the motion of Allen Calculators, Inc., for leave to intervene and to file an answer attached to said motion, copies of which motion and answer had been served on the United States Attorney General and the attorney for National Cash Register Company, and such motion was argued by counsel for the United States, The National Cash Register Company and movant, on consideration whereof the court overrules said motion; to which ruling Allen Calculators, Inc., excepts" (R. 16-17).

Allen's notice of application, proposed answer and order allowing intervention were identified (R. 43) as Proposed Intervenor's Exhibits "A," "B" and "C," respectively, and appear: Exhibit "A," R. 55; Exhibit "B," R. 56; Exhibit "C," R. 64. Allen's proposed answer (R. 56) showed the interest of Allen, both individually and as representing the independent dealers in preventing acquisition by Cash of the controlling stock of Allen-Wales.

Allegations included in the proposed answer are, in numbered paragraphs:

1. Allen, Allen-Wales and Cash are competitors.

3. The basic principles underlying cash register combinations, adding machines and the other articles enumerated in 1 are substantially the same.

4. Cash has the facilities to manufacture adding machines and there is no reason why it should not develop its own line (R. 57).

5. The real object of Cash in seeking to acquire Allen-Wales is to eliminate that company from the competitive field, and to increase the monopoly it had and has. In the last subparagraph of 5, attention is called to the plan of Cash to withdraw the manufacturing plant of Allen-Wales from Ithaca, New York, and to integrate it into the Cash plant at Dayton, disturbing the relationship of some four hundred employees in the Ithaca plant and the course of commerce from New York (R. 57). (This direct challenge of the purpose for which Cash was seeking acquisition and the statement of absorption and dislocation do not appear in the answer filed by the Government) (R. 14-16).

9. Within the independent companies, Allen had developed during the past few years by far the greatest volume of the combination adding cash register (R. 59).

11. The combined total sales of all independents increased each year and amounted to a total in excess of twelve thousand per annum. If Cash secured Allen-Wales, Cash

“will be a formidable competitor against all independents, who will have reason to fear their competition” (R. 60).

12. Cash had acquired a strong competitor, Remington cash register, which had become such after February, 1916 (R. 60).

13. Acquisition about 1929, of control by Cash of the Ellis Adding-Typewriting Company with machines, which contained the features of adding machines and billing machines (R. 60). [This is of importance (see R. 32 top) since Second (p) of the decree of February 1, 1916, permits acquisition only if such acquisition is "desired" to

"supplement the plant, patents, machines, or facilities of the defendant corporation . . ." (R. 6). With purchase of Ellis no further supplement for adding machines was necessary.]

14 and 15 contrast the Cash agency and the independent dealer system of doing business and show that dealers handle one make of machine by direct dealing with the manufacturer, but handle all types of rebuilt machines and that the rebuilding of older machines is a profitable part of the business (R. 61).

16 to 19, inclusive (R. 61, 62), show various ways in which Cash, if permitted to invade the dealer field by purchase of Allen-Wales, could make it impossible for the independent dealer to compete.

20 shows the special personal interest of Allen and the confusion and loss of good will that would result if the trade should get the impression Mr. Allen had sold out to Cash. It was noted in this paragraph that he claims an interest in Allen-Wales through pending litigation.

21 shows why it would be dangerous to permit Cash to buy Allen-Wales "under any conditions" (R. 63). [Allen should have been allowed to develop this contention before the order of December 7, 1943 (R. 17) allowed acquisition on certain conditions included in 9 of that order (R. 19-21). But, this order was worked out by the court, Cash and Government counsel only, with Allen treated as a complete outsider and given no opportunity to present views or contentions respecting it.]

22 denies matters of substance in Cash's petition (R. 63-4) which are either not denied or not so clearly denied in the Government's answer (R. 14-16).

It will be seen, therefore, Allen's proposed answer tendered substantial issues.

On December 4, 1943, Allen filed its petition for appeal (R. 23), assignment of errors (*id.*) and jurisdictional statement (printed pamphlet). As shown in Allen's supplemental jurisdictional statement filed December 10, 1943 (pamphlet, p. 13), the court postponed action on Allen's appeal papers to December 6 and then until December 10, upon which date Allen's appeal to this Court was allowed (R. 24).

On December 7, 1943, the court entered its "Findings and Order" (R. 17) approved as to form by attorneys for Cash and for the Government. This entry grants the prayer of the petition on certain conditions (R. 19, par. 9). The Government has not appealed.

With Cash's statement in this Court, opposing jurisdiction, was filed a motion to dismiss or affirm. On February 7, 1944, further consideration of the question of jurisdiction was postponed to the hearing on the merits and the case was transferred to the summary docket (R. 108).

Specification of Assigned Errors Intended to Be Urged

All of the three assignments of error (R. 23-4) are intended to be urged, namely, (1) overruling motion for leave to intervene, (2) withdrawing leave to intervene conditionally, (3) failing to enter order in conformity with decision in refusing leave to intervene.

Summary of Argument

The appeal involves the right of a private concern, both specially affected and as representative of a class intended

to be protected in an anti-trust decree, to intervene, with the Government's consent, in opposition to modification of a consent injunction in such decree, to permit acquisition, by the company enjoined, of controlling stock of a competitor.

Rule 24 of the Rules of Civil Procedure is relied on by Allen as conferring right to intervene. It is printed as an appendix.

The decree of February, 1916 (R. 1) was entered against National following convictions of its officers and agents in a criminal proceeding for violation of the anti-trust laws, and reversal with directions to award a new trial. *Patterson v. United States*, 222 Fed. 599 (C. C. A. 6, 1915), pp. 633, 634, 637, 639, 643, 650. It was charged National (pp. 611t, 623, 625) did from 80 to 95 per cent of the manufacturing and selling of cash registers. The proposed answer of Allen (R. 56, 57, bot., par. 5, 60, par. 12) set up that National still exercises predominant control in its field. The opinion in the criminal case, refers to evidence of the most flagrant character of illegal acts utilized for ruthless suppression of competition. The decree sought to be modified enjoins, in sub-paragraphs (a) to (p), inclusive (R. 2-5), a great number of such acts. Second (p) (R. 5) enjoins National from acquiring ownership or control by means of stock ownership of the whole or an essential part of the business of any competitor engaged in the manufacture or sale of cash registers or other registering devices, but provides in case any such acquisition is desired a petition may be presented to the court, which the court may allow. The paragraph Third (R. 6) of the decree is a usual one in anti-trust injunction cases. It retains jurisdiction of the cause for the purpose of enforcing the decree and of enabling the parties to apply to the court for modification.

By this decree, the court assumed control of the stock of all competing corporations so far as might concern acquisition of stock of any of them by National and, in effect, placed the "disposition of property in the custody of the court" within the meaning of Rule 24(a)(3) relating to intervention of right. The decree was intended for the protection of the public and of competitors. It is to be read in the light of the illegal acts found and enjoined. Even without the reservations in the decree, only the court which passed the decree had jurisdiction to modify it and to consider whether it should be modified. The jurisdiction of the court which entered the decree to modify it is, therefore, just as exclusive as a suit in rem or quasi in rem. No court has power to modify the decree of another court.

The decree gave appellant and independents generally doing business under the dealer system and competing with National, rights additional to those accorded them under the Sherman and Clayton Acts: it provided, for example, a proposed acquisition must supplement the plant, must be for that purpose, and dealt, not only with cash registers, but any other registering device. Thus it was more stringent than the anti-trust laws. It would not necessarily be a violation of these to acquire "an essential part of the business of a competitor" which would not supplement the plant of the acquirer. The decree, Second (p.), R. 5, however, prohibits such acquisition.

Appellant could not assert its rights in any other court. As before stated, it could not ask any other court to interfere with the discretion of the court which entered the decree to modify it. It could not sue under the Clayton Act in any other court, because that Act gives a remedy only against threatened violations. Here the violations had been enjoined. As the Clayton Act does give a remedy to prevent injury, inferentially it, as "a statute of the United

States confers an unconditional right to intervention" within the meaning of Rule 24(a)(1). Should the court modify the decree and permit acquisition, appellant's rights to protection would then be lost, if it were assumed these could have been asked of some other court. The contract for acquisition was signed subject to the court's approval. This being given would thus constitute a completed transaction. The Clayton Act (Sec. 16) does not relieve against completed transactions, but only against threatened injury from actions to be taken. *Fleitman v. Welsbach Street Lighting Co.*, 240 U. S. 27 (1916). As the Clayton Act gives a remedy by injunction against threat of special injury, it also confers by implication a right, through intervention, to prevent special injury by vacating an injunction.

Moreover, as a practical proposition, any other court than that in which the decree was passed would, if the hurdle of interfering with the decree of another court were surmounted, deny relief on some theory, such as that the suitor was precluded by representation of the United States through the decree in the principal case, *Wyoming v. Colorado*, 286 U. S. 494, 508-9, or on principles of comity or *stare decisis*, or by exercising discretion not to award equitable relief. To permit intervention under Rule 24(a)(2), it is not necessary to show conclusively that the representation of applicant's interest by existing parties is inadequate and the applicant is bound by a judgment in the action: a showing that the representation "may be inadequate" and that applicant "may be bound" by the judgment suffices.

Invoking Rule 24(a)(2) is not intended as a reflection on Government counsel. They, perhaps, considered the representation of the applicant's interest by existing parties might be inadequate, since they not only made no

objection to intervention but argued in favor of permitting it. Not all points mentioned in appellant's opening statement or proposed answer and which would have been presented had intervention been allowed; were noticed or developed at the hearing.

Also, as the decree of 1916 followed extensive and serious violations of law and was entered at the instance of the United States, a modification of the decree to permit acquisition and lessen competition should have been permitted, if at all, only after the fullest presentation of the facts to the court and not in the shape of informal communications presented to the court for its "inspection," especially after the court expressed disapproval of the letters as evidence (R. 39). A witness in Cincinnati might have been produced without undue inconvenience. If it was not desired to produce other witnesses farther distant, the depositions of Allen-Wales dealers might have been taken by the Government upon oral examination or upon written interrogatories.

The United States was certainly in an adversary position when it prosecuted National criminally and enjoined it. Why this adversary position should disappear on a petition for modification and the Department in effect be transformed into a "commissioner" (R. 45) is not apparent. It is a question whether the Government, after having assumed such non-adversary position, did not lose its right of appeal from the decree subsequently entered.

Rule 24 is to be liberally construed. In the problems of anti-trust enforcement, judges should be "willing to hear from more than the conventional parties in an adversary procedure" and should "accept economic testimony appropriate for laying down a broad rule of industrial government . . ." and ". . . frame decrees suited to the character of the many dimensions of the problem revealed."

Crosby Steam Gauge, etc., Co. v. Manning et al., Inc., 51 F. Supp. 972, 974 (1943), Wyzanski, J.

Cases cited by opponents before adoption of the Federal Rules of Civil Procedure are distinguishable. Rule 24 amplified the right to intervention (notes of the Committee published by Government Printing Office, Document 101, p. 243), and "should be construed with great liberality." *Western States Machinery Co. v. S. S. Hepworth Co.*, 2 F. R. D. 145, 146. The rule dispenses with the requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation. *Securities Commission v. United States Realty Co.*, 310 U. S. 434, 459 (1940).

The refusal of leave to intervene in this case is appealable to this court. First, it is a final judgment in an anti-trust case. It is final because appellant could not seek to prevent modification of the decree allowing acquisition in any other court than that in which intervention was sought. If intervention is not obtained, that is an end of any rights Allen might have. It could not appeal from the decree of modification, no matter how erroneous and injurious. Second, the refusal of intervention was not discretionary, since under Rule 24(a)(1), "a statute of the United States confers an unconditional right to intervene" under the circumstances of this case; and the conditions for intervention of right under 24(a)(2) and (3) also exist. Third, if, contrary to the foregoing, allowance of intervention was discretionary, appeal lies from an unreasonable exercise of discretion.

The suggestion that the case has become moot because the decree was not superseded is untenable. The jurisdiction of this court is not so easily ousted. It exists whether an appeal is taken without supersedeas or with supersedeas (if it be assumed an appellant denied the right to inter-

vention may supersede a decree to which he is not a party). Allen excepted to the order of November 16, 1943, refusing it leave to intervene (R. 17). It filed its petition for appeal, assignment of errors and jurisdictional statement and served copies on National and the Government counsel, and requested the court to fix the bond for appeal on December 4, 1943. The court postponed the matter of allowance of appeal to December 6 and again on December 6 to December 10. (Pphlet. Suppl. Jur. St., p. 13.) The decree of December 7, allowing acquisition, was thus entered at a time when all steps which appellant could by then take for appeal had been taken and made a matter of record. The filing of the appeal papers constitutes a *lis pendens*. The appeal was perfected at the same term as soon as might be. When the decree of December 7 was entered, National and Allen-Wales and its stockholders had a right to proceed, but at the risk that the appeal from the order refusing appellant leave to intervene would be sustained. The statement inserted by the court in the order allowing appeal, that it did not supersede the Findings and Order entered December 7, 1943, is no more than is true in law without such statement. Allen could scarcely supersede a decree to which it was not a party any more than it could appeal from such decree to which it was a stranger. If a case becomes moot in the absence of supersedeas, then this court does not have jurisdiction (and, of course, it has) to review cases appealed without supersedeas.

ARGUMENT

I. Allen Was Entitled to Intervention of Right Under Rule 24(a)(1), (2) or (3).

As to 24(a)(1), Section 16 of the Clayton Act, properly interpreted, confers an unconditional right on one of a

class protected by an anti-trust decree to intervene in opposition to attempted injurious modification of it. The statute confers a right to injunctive relief in a United States Court against threatened loss or damage by a violation of the anti-trust laws. It does not in terms allow intervention in the cause where an injunction granted is sought to be vacated, in part, so as to cause damage to proposed intervenor. But if there is threatened loss or damage, and the court which passed the decree is the only one having jurisdiction of the proceeding for modification, then there is no right to seek injunction elsewhere, nothing to enjoin elsewhere, and the rights conferred by the Act must be asserted in that court. As said in *Securities and Exchange Commission v. C. M. Joiner Leasing Corporation et al.*, 320 U. S. 344, 350:

Courts will construe details of an act in conformity with its dominating general purpose, will read the text in the light of the context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.

As to 24(a)(2), the representation of the applicant's interest by the Government may have been considered by the Government inadequate in view of the Government's request that applicant be permitted to intervene to show its special economic interest and that of the class of dealers to which it belonged. Besides, Allen tendered a showing of factors which were not presented or urged upon the court and of which the court should have had the benefit before deciding to permit acquisition, or on the protective sufficiency of the conditions in the decree. The court should have been more fully apprised of the very recent incipency, 1940 (R. 47, 93t), rapid growth and real competitive nature of the so-called Allen-Wales adding cash drawer, for

instance, and that the acquisition of Allen-Wales removed the largest of the independent competitors (R. 90). Previous wrongdoing, not to be ignored when size has been utilized in the past, and opportunity for abuse, were not sufficiently considered by the court; nor, were warnings against modification in *United States v. Swift et al.*, 286 U. S. 106, 116, 117, bot. 18, and the rule also prescribed in that case that nothing less than a clear showing of grievous wrong should lead to change from what was decreed after years of litigation with the consent of all concerned (p. 119). See, also, *Chrysler Corp. v. United States*, 316 U. S. 556, 562.

The Government's case was informally presented by letters for "inspection" instead of valid evidence and the Government assumed a non-adversary or commissioner position. So, the representation of petitioner's interest may have been inadequate.

Likewise, when the court modified the decree over which it had retained jurisdiction, no other court would, if it could, give relief to Allen and it would be bound by the judgment. This result would be reached by one of a number of possible theories and reasons for denying relief. A court might say that the case was *res adjudicata* because the rights of the applicant were concluded by the applicant having been represented, adequately or inadequately, by the United States. The underlying reason for denying relief in an independent action would be the rule of comity which would preclude one court from attempting to interfere with a judgment of another modifying its decree under express terms of a reservation permitting modification. In *United States v. Lane Lifeboat Co., Inc., et al.*, 25 F. Supp. 410, 411, a suit by the United States against the Boat Company and its surety for damages because of patent infringement liability paid, the intervenor

had indemnified the surety company. The court said that Rule 24 should be liberally interpreted and, although the judgment would not directly bind the petitioner, it would, in the last analysis, do so indirectly. In *United States ex rel. Skinner & Eddy Corporation v. McCarl*, 8 F. (2d) 1011 (Ct. App. D. C.), the court held that when one court has acquired jurisdiction of the subject matter of a case, no court of coordinate authority is at liberty to interfere with its action and said, pp. 1011-12:

"It is manifest that there are pending in a court of competent jurisdiction two suits involving the contracts upon which the claims submitted to the Comptroller General are based. If, as suggested by appellant, that court should be of opinion that the assignment to the United States was subject to all existing equities, and that the claim here involved is not in law a claim against the United States, notwithstanding the assignment, then there would be no necessity for the writ. But, whatever may be the decision of that court, it having acquired jurisdiction of the subject-matter of this case, no court of coordinate authority is at liberty to interfere with its action. This principle is so familiar as to require no citation of authorities."

Certiorari was granted, 270 U. S. 637, and the case was affirmed on other grounds, 275 U. S. 1.

As to 24(a)(3), while the stock of competing companies is not physically in the custody of the court, it is, by the reservations of the decree so far as relates to acquisition by National, constructively in the custody of the court and the applicant is so situated as to be adversely affected by the permitted disposition of such property. In *Wabash R. R. v. Adelbert College of the Western Reserve University*, 208 U. S. 609, on petition for rehearing and motion to modify the judgment, leave was asked to permit the judg-

ment of the Ohio court to stand to the extent that it would not involve interference with the constructive possession of the federal court. The request was denied. It is recognized that the rule of that case refers to exclusive jurisdiction resulting from seizure or beginning of an action looking to seizure of property. But, by liberal interpretation, there will be a disposition of property (cf. *Herbert's Est. v. Commissioner*, 139 Fed. [2d] 756, 758, 2 Cir.) in the custody of the court, when, after a court, at the instance of the public authorities, has enjoined acquisition of such property with express reservation of right to modify the decree, the court entertains an application of the party enjoined to modify its decree, and permit the disposition by purchase of such property.

II. If Allen Was Not Entitled to Intervention of Right Under 24(a), It Should Have Been Permitted to Intervene Under 24(b)(1) or (2). An Appeal Lies Where, as Here, There Was an Unreasonable Refusal of Permission to Intervene.

As to 24(b)(1), if Section 16 of the Clayton Act does not, as we contend it does, confer an absolute right of intervention, inability to assert rights under that statute in any other court confers a conditional right to intervene.

As to 24(b)(2), the applicant's defense and the main action have questions of law or fact in common.

The exercise of discretion by the court is reviewable by appeal in this, as in other cases, where the discretion of the court has been held to be reviewable. Thus, in *N. L. R. B. v. I. & M. Electric Co.*, 318 U. S. 9, 16, 30, it was decided that under Sec. 10(e) of the Act, an application to adduce additional evidence is addressed to the sound judicial discretion of the court and the question was said to be, did the court act arbitrarily or abuse its discretion. It was

found the order was not arbitrary or unreasonable or an abuse of discretion, but the right of review was not questioned. See, also, *Ohio Oil Co. v. Conway*, 279 U. S. 813.

In *City of New York v. New York Telephone Co.*, 261 U. S. 312, decided in 1923, before the Rules of Civil Procedure were adopted, at p. 317, the court, after reviewing previous decisions, said:

"These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, . . ."

See, also, to the same effect, *State of Washington v. U. S. et al., Columbia R. Packers Ass'n, et al. v. Same*, 87 Fed. (2d) 421, 433, 434, 435, C. C. A. 9, (1936).

In *In re Engelhard & Sons Co.*, 231 U. S. 646, cited by opponent, intervention of a customer of the telephone company was allowed to permit petitioner to assert its own claim (p. 649) and with the right to renew its application when making it appear it had authority from other specifically named claimants to represent them. Cf. *Louisville Tr. Co. v. Louisville, Etc., Ry. Co.*, 174 U. S. 674, 685, 686.

The reason why a refusal of leave to intervene is usually regarded as discretionary and not final is because, in the ordinary case, denial of the application does not prejudice the applicant, who can assert his rights in another court. This is stated in *Credits Commutation Co. v. United States*, 177 U. S. 311, 315. But it is also stated (p. 315) that it is doubtless true cases may arise where the denial would be a practical denial of relief which can only be obtained by intervention, as in the instance where there is a fund in court and the refusal is not discretionary there. As we have shown, while there is not here a fund in court, there is exclusive jurisdiction regarding an acquisition of stock in the court where intervention was sought.

In general, permission for intervention has been wisely and liberally accorded to private concerns representative of a class or especially interested. As recent examples, in *Eastern-Central Motor Carriers Ass'n. v. United States*, U. S. . . , 64 S. Ct. 499, 501-2, note 5, this Court allowed the National Industrial Traffic League to intervene. In *McLean Trucking Co., Inc. v. United States, et al.*, U. S. . . , 64 S. Ct. 370, 372, note 2:

"Other motor carriers, shippers and shippers' organizations intervened in the proceeding, as did also the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America."

In the suit to set aside the Commission's allowance of merger, the Secretary of Agriculture and the American Farm Bureau Federation intervened as plaintiffs. In that case, the statute (p. 374) requires giving notice and reasonable opportunity for interested parties to be heard; and authorizes and in certain instances requires the Commission to set the application for public hearing. Such public hearing procedure might well be employed by a court when asked to vacate an anti-trust injunction against stock acquisition.

III. The Suggestion, Now Made in Opposition, That the Motion to Intervene Was Not Timely Is Not Supported by the Record, and, Moreover, Is Not Available to National.

As previously stated, if this objection had been made, the timeliness of the motion to intervene would have been shown. Without going into the matter unduly at this time, it may be stated that the answer of the United States was not filed until Thursday, November 11 (Armistice Day) (R. 14), and the hearing was Monday morning, November

15 (R. 28; 29). The petition to modify (R. 8 iv) stated that the contract would be exhibited to the court at the hearing. It was not available to appellant for examination before the hearing (R. 35). Neither was the stipulation between the Government and National (R. 35). Interventions are not allowed to impeach a decree already made. *United States v. California Canneries*, 279 U. S. 553, 556. Surely, for the convenience of all parties, an application for leave to intervene is suitably made when presented at the very opening of the proceedings. The Government, in subordination to which appellant sought to intervene, urged, when the application was made, that the application met all the conditions of Rule 24 and should be granted (R. 34).

In *Leary, Admr. v. United States*, 224 U. S. 567, the decree was reversed for refusal, because of supposed laches, to permit intervention. The opinion by Justice Holmes ends (p. 576):

"On the whole matter it seems to us that she was dealt with too technically. In the circumstances it seems to us that the leave to intervene may be granted subject to the condition that the evidence already in shall be taken to be evidence against her subject to her right to recall and cross-examine such witnesses for the Government as she may be advised."

The last sentence of Rule 24(b) requires:

"In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The court below did not consider whether the intervention would unduly delay or prejudice adjudication of the rights of the original parties. There was no proof by Cash of delay or prejudice and the Government had affirmatively said (R. 34) there was none.

It was not until well on in the afternoon session (R. 37 top, 40) that the court withdrew the conditional intervention granted at the beginning of the morning session and ruled Allen could not intervene. The ruling then was wholly unrelated to timeliness or prejudice to the rights of the original parties.

Also, this was before the time previously accorded Allen for citation of authorities (R. 33) and without having the benefit of authorities (Cf. *Illinois Steel Co. v. Ramsey et al.*, *Same v. Aigler et al.*, 176 Fed. 853, 863, C. C. A. 8, [1910], where somewhat similar action was disproved.)

The court should, as requested, have made an entry giving its reason for refusing intervention, namely, supposed lack of status to intervene. The failure to do this is assigned as error (R. 23, 24). But the reason for the court's refusal is, from the record, nevertheless, patent.

IV. The Case Is Not Moot.

A case may be appealed with or without supersedeas. Allen could not appeal from the order of December 7, 1943 (R. 17), regarding which it was not consulted and to which it was not a party. What Cash may have done under that order is not in the record and statements of counsel in their briefs here are not substitutes for evidence. But, however that may be, one who acts under a decree before time for all appeal has elapsed, does so at its own risk. He cannot oust the jurisdiction of the appellate court by so proceeding.

As matters now stand, the petition of Cash for leave to acquire Allen-Wales has been granted on certain conditions (R. 19, par. 9). Acquisition under any conditions should not have been permitted despite the findings in par. 8 (R. 19), because, among other reasons:

1. "An essential part of the business . . . of . . . a competitor"

will not, in this instance, Allen asserts,

“supplement the plant, patents, machines or facilities of the defendant corporation.”

2. It was not clearly shown that the acquisition was “desired for that purpose.”

Allen contends the purchase was to get rid of a promising competitor and other competitors, including Allen, in the dealer field.

3. It was not clearly shown that the acquisition “will not substantially lessen competition,” with those words correctly interpreted.

As to this last, Cash maintained, consistently throughout the hearing, that what was meant by this phrase in Second (p) of the decree of February 1, 1916, was only present competition and competition between Cash and Allen-Wales. For example, in the opening statement (R. 69):

“We claim that there is no present substantial competition and that, therefore, the elimination of any competition, if there should be any, will not substantially lessen competition.”

and in the Further Statement on Behalf of Petitioner (R. 74):

“... the Clayton Act deals with the acquisition of stock of one company by another where the effect of the acquisition will be to substantially lessen competition between the purchaser and the seller. And I submit to your Honor that this question about the effect on some little merchant is not in this case; it has got nothing to do with this decree or the Clayton law.”

Again (R. 37):

“Our position is, your Honor, that the only question before the Court is whether there is any substantial

competition between the corporation which is making the purchase and the corporation which is being sold, and if the result of the acquisition would be to substantially lessen competition between those companies.

"The Court: Yes, I understand the Government's opposition is limited to that, that you are opposing just on that ground alone."

and (R. 38, top):

"Mr. Moyer: Oh, the original complaint——

"The Court: —I understand, but we are talking about the decree.

"Mr. Moyer. Provided it does not reduce competition.

"Mr. Graydon: Between the buyer and seller."

When Government counsel opposed this view and stated its position as based not only on the direct competition and on potential competition, but also the effect on competition at the distribution level (R. 37), the court indicated at the trial and in par. 5 (R. 18) of its findings, agreement with Cash's narrow and not permissible interpretation of Second (p) of the 1916 injunction. This view is the more clearly erroneous because Allen-Wales had only begun its growing competition in adding cash drawer machines with Cash's cash register a year or so before production of this commodity was suspended by war production in 1942 (R. 47 iv, 67). The Court's findings 3, 4 and 5 take no account of this (R. 18). Such interpretation is in conflict with opinions of this court, such as *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356-7; *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150, 224; *Fashion Guild v. Federal Trade Commission*, 312 U. S. 457, 466.

The past wrongdoings of the petitioner, its size (with sales in 1941 of over \$48,000,000 in products (R. 68) and

its still continuing monopoly were not taken into account, as required by *United States v. Swift & Co.*, 286 U. S. 106.

In that case the court said (p. 116):

“... size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past”

and (pp. 117-18):

“Size and past aggressions induced the fear in 1920 that the defendants, if permitted to deal in groceries, would drive their rivals to the wall. Size and past aggressions leave the fear unmoved today. . . . The question is not whether a modification, as to groceries can be made without prejudice to the interests of producers of cattle on the hoof. The question is whether it can be made without prejudice to the interests of the classes whom this particular restraint was intended to protect.”

and (p. 119):

“There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. . . . The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.”

According to this case, therefore, the burden of proof was on petitioner to show:

1. The danger from acquisition of competitors guarded against by injunction in the 1916 decree no longer existed, and

2. Under existing conditions it would be a grievous wrong to Cash if it were not permitted to acquire Allen-Wales. This burden was not met.

So, we repeat, acquisition should not have been permitted under any conditions. If this is so, since the Government has not appealed from the order of December 7, allowance of intervention should be ordered in order that there may be a setting aside or reversal of the subsequent decree allowing acquisition.

Allen is of opinion nothing short of refusal of leave to purchase will adequately protect it and other independents, and that the conditions in the decree do not sufficiently protect Allen and other dealers against restraint of trade and monopoly. The conditions are bound to be, to some extent, at least, a reflection of the erroneous view that because there may have been only slight competition between Allen-Wales and Cash, acquisition was permissible.

A decree permitting acquisition of Allen-Wales, no matter what conditions might be inserted, would not, in view of Cash's great size, practical monopoly and history of relentless suppression of competition, safeguard independent dealers (Allen's proposed answer, par. 21, R.'63). Independent manufacturers do not have the capital necessary to establish their own sales organizations. Therefore, they must depend upon the existence of dealers as practically the sole means of distributing their products. So long as Cash, with its large capital and sales organization does not invade the dealer field, there is equality of competition, both between the independent manufacturers for the dealer good will and between the dealers for the in-

dependent manufacturers' good will. While this equality exists, any independent manufacturer has the chance of entering new territory by meeting or bettering the terms which other independent manufacturers offer to dealers in it. But, if Cash takes away one of the dealers in a given territory by absorbing him into its sales organization, the competitive field between the independent manufacturers for the dealer good will immediately becomes affected by reduction in the number of dealers, to the detriment of the independent manufacturers. If, on the other hand, Cash takes over the Allen-Wales dealer and continues him as such for Cash, the equality of competition in the dealer field is also adversely affected; because Cash, with its tremendous resources, can offer terms to the dealer such as would put him on a competitive basis with the other dealers that would enable him either to drive them out of business entirely or seriously affect their ability to serve the independent manufacturers (R. 61-63).

The conditions put in the decree can be easily met or circumvented with resultant suppression of competition. Allen-Wales dealers will recognize that, under conditions A, B (R. 19-20) and E (R. 21), their life as such is limited to a few years at most. There will thus not be the same incentive for building up good will as if the dealer knew he could anticipate continuing as such indefinitely. But even before the period of Allen-Wales dealer franchise expiration, Cash can invade the field where it considers its representation inadequate or lacking. It can go into territory with its agents in which Allen-Wales has no representation and thus displace potential Allen-Wales dealers. Discrimination is not forbidden under F (R. 21), which seeks to guard only against "unfair or unreasonable discrimination." Cash agents can, therefore, be favored by Cash against Allen-Wales dealers in many ways. It

would be easy to give superior service to Cash agents over Allen-Wales dealers with plausible justifications for doing so. To show there was "unfair or unreasonable discrimination" would be difficult, and in some instances impossible. And yet it would exist. Cash is allowed to cancel before January 1, 1950, contracts with Allen-Wales dealers either (1) with the consent of the dealer (which could be obtained by offering him a favorable Cash agency or some other inducement), or (2) for claimed breach of the contract by the dealer. Doubtless the terms of these contracts are such as adequately protect Cash and would permit it to cancel for non-performance for lack of sales or violation of the contract in any way. While jurisdiction to enforce the decree is reserved by par. 10 (R. 21), dealers, for fear of reprisals, lack of financial strength or other reason, are not likely to invoke privileges conferred, either by incurring the expense of proceeding themselves or enlisting aid of the Government.

Allen, excluded from the case and having filed its appeal papers before the decree permitting purchase was entered, had no opportunity to study it critically or present objections to it or appeal from it. The Government has not appealed; perhaps because, although its answer requests that the petition be denied (R. 16), it is of opinion (erroneously, in Allen's view) the conditions are adequate for protection of independent dealers, or perhaps because having, in the course of the trial, assumed a non-adversary and merely advisory attitude, it would be inappropriate, if permissible, for a "commissioner" to appeal. The result is, therefore, unless Allen is permitted to appeal from the order refusing it intervention and the trial court is ordered to permit Allen to intervene, a decree in a matter of public importance, either totally erroneous in allowing acquisition, or insufficient in its protection against restraints of competition and monopoly, will become fully operative.

CONCLUSION

The appeal to this Court from the order refusing intervention should be sustained and the order reversed with directions to permit intervention. It is suggested, with deference, that should the Court reach this conclusion, the Court indicate, if deemed appropriate, that consideration, when acting anew on the petition for acquisition after intervention has been allowed, should be given not merely to 1941 competition between buyer and seller, but to potential competition and possible injury to the interests of all of the classes whom the particular restraint was intended to protect; also, that consideration should be given to whether the dangers that existed in 1916 from restraint and monopoly have disappeared and whether it would be a grievous wrong to change what was then decreed with consent; finally, that if a clear showing is not made by petitioner in all these respects, the findings and order filed December 7, 1943, should be set aside and the petition for modification of the decree be denied.

Respectfully submitted,

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APPENDIX**Rule 24. Intervention.**

(a) **INTERVENTION OF RIGHT.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) **PERMISSIVE INTERVENTION.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **PROCEDURE.** A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. . . .

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CHARLES ELMORE PROPLEY
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Supreme Court of the United States

October Term, 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

v.

THE NATIONAL CASH REGISTER COMPANY and
THE UNITED STATES OF AMERICA,

Appellees.

REPLY BRIEF FOR APPELLANT

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FRANK R. BRUCE,

Counsel for Appellant.

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SCRIBNER & MILLER,

Of Counsel.

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REPLY BRIEF FOR APPELLANT

I. THE COURT ERRED IN NOT DISMISSING CASH'S PETITION. THE CONDITIONS UNDER WHICH ACQUISITION WAS PERMITTED DO NOT CURE THE ERROR. FOR ALLEN, IN ITS APPEAL FROM REFUSAL OF INTERVENTION, TO SHOW THIS HERE, IS PROPER.

One of the grounds of Cash's motion to dismiss or affirm (printed Statement Opposing Jurisdiction, p. 18) is:

"4. No substantial question is presented by the appeal. It raises only a moot question."

Cash's statement opposing jurisdiction (*id.* pp. 14-16) argues:

"IV. Appeal presents no substantial question. It raises only a moot question."

While Cash now has abandoned this contention, and omits it from its summary of argument (Br. 5) and in the points and argument in the brief, Cash's motion in this Court remains undisposed of by the order of February 7, 1944 (R. 108).

Aside from this, however, if the trial court had dismissed Cash's petition after Allen appealed from the final order refusing leave to intervene, this Court would probably have dismissed Allen's appeal, because Allen would have obtained all the relief which it could have obtained had it been permitted to intervene. It is, therefore, in our view, entirely suitable and perhaps necessary that we argue here, as we have done in our Brief for Appellant: First, acquisition, under the correct meaning of the decree and applicable law, should not have been permitted under any conditions; and only if we are wrong in that; second, that the conditions inserted in the findings and order of December 7, 1943, do not countervail the clear error of allowing acquisition.

In allowing acquisition, the trial court did not follow the applicable decisions of this Court cited in Brief for Appellant, pp. 30-32, and particularly *U. S. v. Swift & Co.*, 286 U. S. 106, cited to the trial court and approved as late as *Chrysler Corporation v. United States*, 316 U. S. 556, 562 bot. The trial court apparently thought (R. 89, 90), as contended by Cash in that court and still contended by Cash here (Br. pp. 26, 29), the matter was governed by *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291. There was a vigorous dissent in that case by Chief Justice (then Mr. Justice) Stone, concurred in by Justices Holmes and Brandeis. But, aside from that and the query whether that case would be followed now under exactly similar circumstances, the facts here are plainly distinguishable: First, because the competition between Allen-Wales with its combination adding cash register and

Cash with its cash register had just begun and was showing healthy growth; second, because the company acquired by International Shoe Company was in financial difficulties and, in the view of the majority, would have disappeared had it not been bought by International Shoe. This was not at all true of Allen-Wales, which was the largest of the independents (R. 59) and was in a flourishing condition and capable of successful and expanding competition with Cash. Section 7 of the Clayton Act, c. 323, 38 Stat. 730, 731 (U. S. C., Title 15, Sec. 18) forbids a corporation to acquire stock of another corporation

“where the effect of such acquisition may be to substantially lessen competition”

between the buyer and seller; or

“tend to create a monopoly of any line of commerce.”

This prohibition is not limited, as Cash still insists (Br. p. 26) to present substantial competition between buyer and seller. This sale, if permitted to stand, will result in suppression of future competition between Allen-Wales, Allen and other independents and Cash and in the increase of the size and monopoly of Cash which the record shows still exist. Thus, for example, in 1941, Cash sold 69,000 cash registers (R. 71).

II. THE COURT REFUSED INTERVENTION ON THE GROUND THAT CASH AND THE GOVERNMENT WERE THE ONLY PROPER PARTIES IN CONNECTION WITH A PETITION TO MODIFY THE ANTI-TRUST INJUNCTION DECREE TO WHICH THEY HAD CONSENTED. IT DID NOT RECOGNIZE THE ANCILLARY AND EXCLUSIVE NATURE OF ITS JURISDICTION.

We repeat this was the ground and the sole ground for the refusal (R. 41 bot.). That was the ground on which Cash objected to the intervention. Allen had no right under

Rule 52(a) to require the court to find the facts specially and state separately its conclusions of law thereon, because its motion for leave to intervene was not "an action tried upon the facts." *Thomas et al. v. Peyser*, 118 Fed. (2d) 369 (App. D. C.). If the court should have found the facts and law, it should have done so on its own motion, as the rule provides:

"Requests for findings are not necessary for purposes of review."

Counsel for Allen presented an entry asking the court to embody in it the above ground. The court did not deny that was the ground, or suggest any other, but declined to state in the entry any ground on which it had refused intervention.

The mistake of the court was in not recognizing that the proceeding in which intervention was sought was on a petition to modify a decree entered to protect the class to which Allen belonged, so as to permit acquisition which would be injurious to proposed intervenor both in its personal interests and as representative of that class. Cash's brief here similarly fails to notice the same matter, i. e., that the Court's jurisdiction is ancillary and exclusive.

The basic reason requiring allowance of intervention is that Allen, in these capacities, was protected by the decree; that the decree was broader in its restraints than the Sherman and Clayton Acts and that the only court which could permit acquisition was the court which had, by the decree, sought to be modified forbidden it. No other court could. This is pointed out in *Carbide & Carbon Chemicals Corp. v. U. S. Industrial Chemicals, Inc.*, 140 F. (2d) 47, 49, 50 (4 Cir.) (appearing in the advance sheets of March 13, 1944, after our original brief was filed), where it is said:

"Ordinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed with it

without interference from other courts under suits subsequently instituted." (p. 49)

and

"The New York judge decided the issue thus made against plaintiff and retained jurisdiction. A proper application of the rules of comity required that respect be accorded this adjudication. For the court below to have ignored it, would have led to an unseemly conflict of jurisdiction and would have benefited no one. . . ." (p. 50)

See, also, *C. I. & W. R. R. Co. v. I. U. Railway Co. et al.*, 270 U. S. 107, 116-17.

III. THE GROUNDS FOR INTERVENTION WERE SUFFICIENTLY STATED TO THE TRIAL COURT. EVEN HAD THIS NOT BEEN TRUE, THIS COURT, IF THE GROUNDS EXIST, CAN SO DECLARE.

Since Cash argues (Br. 16-17) the grounds for intervention were not sufficiently presented to the court, it seems necessary to supplement or perhaps repeat some of the statements in our brief (pp. 3-8). According to Rule 7 (b)(1), a motion made during a hearing or trial need not be in writing and

"the requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion"

such as was admittedly given to the Government and Cash by Allen's Exhibit A for identification (R. 29, 55). No extended statement or argument was necessary, since, when the Government made no objection

"because we feel that the Federal Rule is specifically 24(b)(2), which supports an application to intervene at this time" (R. 29/bot.)

the court immediately granted conditional intervention, examined the proposed answer (R. 30) and called for tentative opening statements. In Allen's opening statement (R. 31), Allen was proceeding to develop what it would expect to show in opposition to the petition. Whereupon the Court asked the theory of claimed right to intervene. To this counsel for Allen gave (R. 32-3), without specifically referring to Rule 24(a), the substance of it by asserting intervention is proper where parties in interest would be affected by the decree, the Government had no objection and felt proposed intervenor's position should be represented and reference to the *Swift* case, *supra*.

Further discussion by Allen of its right to intervene was curtailed by the court then saying to the proposed intervenor that it could cite authorities

"between tonight and tomorrow—to support your position" (R. 33)

and counsel stated the authorities would be supplied (R. 33). Then counsel for the Government repeated:

"this is a decree matter and not a case of first impression" (R. 34)

that the application satisfied the procedural requirements as to time and not unduly prejudicing or delaying rights of the parties involved and that the application should be permitted (R. 34).

Later, Allen specifically referred (rather breathlessly as it was allowed just a minute) to "our right to intervene" (R. 35 bot.) and Section 16 of the Clayton Act as making

"it clear we have the right to intervene."

The court, in the afternoon session on the same day, instead of giving opportunity for citation of authorities as

promised in the morning, without any argument or opportunity to Allen to be heard further, revoked the conditional intervention allowed in the morning and definitely refused intervention (R. 40).

After Allen had been refused intervention, but while the court could still have remedied its error, Government counsel referred to an opinion of Judge Wyzanski in the District Court of Massachusetts in an anti-trust proceeding, saying (R. 86-7):

"There was a question of intervention. He made this very illuminating statement:

'Judges must be willing to hear from more than the conventional parties in an adversary procedure, to receive expert suggestions from specialists and governmental agencies, and accept economic testimony appropriate for laying down a broad rule in industrial government and to find decrees suitable to the character of the many dimensions of the problem revealed.'

That was in connection with an antitrust proceeding similar to this, where the Court is called upon to consider by the decree all the circumstances, any part of the business."

This is *Crosby Steam Gauge, etc. Co. v. Manning, et al., Inc.*, 51 F. Supp. 972, 974 (1943), cited and quoted from in our brief opposing motion to dismiss or affirm (p. 17).

Finally, in the statement as to jurisdiction filed with the court December 4, 1943 (printed Jurisdictional Statement pamphlet p. 1), before any order on Cash's petition had been made, the court was apprised fully of Allen's claimed right of intervention.

The trial court was, therefore, pretty well apprised, about as well as conditions permitted, of Allen's reliance on Rule 24(a) as requiring allowance of intervention, and certainly on 24(b) both by Allen and the Government as

permitting it. But, even if this were not so, this Court is not precluded for that reason from ordering that justice should be done and intervention be allowed if it should have been allowed. *Hormel v. Helvering*, 312 U. S. 552, cited by opponents (Br. 19), is, contrary to their reliance on it, authority for our assertion, because it was said (pp. 556-7):

"There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below."

The suggestion in the brief for Cash (p. 19 bot.) that if there had been a clearer assertion of reliance on Rule 24(a) than they think was asserted, their client

"might well have considered the withdrawal of its opposition to intervention, if there appeared to be any merit in the claim"

and so that they were prejudiced, hardly seems convincing in view of their elaborate and continued insistence that there is actually no right of intervention under Rule 24 or any merit in the claim of Allen or in Allen itself. Cash's objection to Allen's proposed intervention was that it had no standing as an outsider, not specifically included in the decree, to intervene (R. 29 bot.).

IV. THE APPLICATION TO INTERVENE WAS TIMELY. THERE WAS NO UNDUE DELAY OR PREJUDICE.

Cash's brief (pp. 12-13) does not, we think, refute the statements of fact and argument on this point contained in our brief under III (pp. 26-8), although it goes outside the record in an attempt to do so. Contrary to their

apparent argument that Allen knew in advance of the stipulation between the Government and Cash, although it was not filed of record or introduced until after the trial was under way, the record shows that when the chart referred to was offered in evidence (R. 36), Allen stated that so far as it related to that corporation, the chart was incorrect and Allen desired to correct it (R. 36 bot.). This proves it had not been shown to Allen. Also, when the court asked (R. 35 top) "if it was conceded Allen-Wales was one of nine manufacturing the same type of machine and whether there would be eight doing the same line of business "if the deal went through," Allen denied that fact. It will be noted (R. 13) that the notice of petition and service of same on the Attorney General were not filed in the District Court until September 24, 1943. There was no order of court of record fixing any certain time for the hearing on the petition. The difficulties of filing a suitable intervening answer without seeing the contract of purchase or knowing of the Government's attitude or what it would admit, were great. Application to intervene was conceded by the Government to be timely; contention to the contrary or proof were not made by Cash before intervention was refused; the court did not, as required by Rule 24(b) consider whether the intervention would unduly delay or prejudice the adjudication of the rights of the original parties and we do not purpose noticing or attempting to refute subsequent statements of Cash's attorneys which are not evidence.

When counsel for appellant stated he had not seen the stipulation and wanted to examine it before it was marked in evidence (R. 35), he was not, as Cash says in its brief (p. 13)

"interjecting himself into the proceedings."

Allen had then been admitted, though conditionally, and was a party and was given by the court

“an exception to everything that takes place here”
(R. 35).

Only a party may take such exceptions.

V. A REFUSAL OF INTERVENTION IN A MODIFICATION OF ANTI-TRUST DECREE PROCEEDING IS APPEALABLE BY DIRECT APPEAL TO THIS COURT AND NONE OTHER, WHETHER INTERVENTION IS OF RIGHT OR PERMISSIVE WITH DENIAL CONSTITUTING AN ABUSE OF DISCRETION.

Such an appeal was sustained in *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502; *United States v. California Cooperative Canneries*, 279 U. S. 553, ruled that an appeal to a Circuit Court of Appeals in such case is not permissible. The former case, it is true, differs from this in that the proposed intervenor there was specifically named in the decree, whereas here it is included by operation of law as one of a class to be protected by the decree. This difference, however, does not prevent appeal to this Court from refusal to intervene; in both cases, the refusal of intervention was the final decree of the court as to the respective intervenors, because in both cases the intervenors' rights would be lost if not permitted to intervene. In *Securities Commission v. U. S. Realty Co.*, 310 U. S. 434, 458, the opinion refers to the “refinements” of intervention of right and permissive intervention preserved by Rule 24. The question was said to be (p. 458) whether the District Court abused its discretion in allowing intervention. If appeal is permissible from allowance of intervention on the claim of abuse of discretion, an appeal from a refusal of intervention constituting an abuse of discretion is likewise permissible.

In *Carbide & Carbon Chemicals Corp. v. U. S. Industrial Chemicals, Inc.*, *supra*, the discretion involved was to grant or refuse declaratory relief: The court said such discretion

“‘is a judicial discretion and must find its basis in good reason’ and is subject to appellate review in proper cases.”

See, also, *Gargano v. United States*, 140 F. (2d) 118 (9 Cir.), holding an order denying defendant’s motion to set aside a portion of a judgment sentencing defendant under one count of an indictment was a “final decision” and appealable.

VI. THE COURT’S REFUSAL OF INTERVENTION WAS ERROR REQUIRING REVERSAL.

Allen had a special interest in resisting the petition; shown, for example, by paragraph 20 in its proposed answer (R. 56, 62-63), because of the confusion that would result from the impression that Allen had sold out to Cash.

The suggestion in Cash’s brief (p. 23) it was developed in the course of Mr. Allen’s testimony that he has a lawsuit pending against one of the stockholders, is incorrect, because that matter had been stated in the last sentence of paragraph 20 of Allen’s proposed answer (R. 63). Counsel also assert, without any evidence in support, that Allen’s averment in paragraph 5 of the proposed answer (R. 56, 58) that Cash intended to dislocate the Ithaca plant of Allen-Wales is untrue. Allen tendered an issue on that point, and it is not to be presumed it had no evidence in support of its averment merely because Cash’s counsel deny it in a brief. On the contrary, VIII (c) of Cash’s petition (R. 6, 11) gives as one of the reasons why it desires to acquire the stock of Allen-Wales that thereby it

“will provide additional employment for men and women in the petitioner’s factory in Dayton, Ohio. . . .”

It is somewhat amusing that Cash's counsel suggest Mr. Allen's testimony as a reason why the court may have refused Allen intervention, because Allen's testimony was not given until after conditional intervention had been revoked and intervention had been finally refused. To say that testimony given after the court had refused intervention was the reason for the court's refusal is to ascribe to the court a greater degree of prescience than is possessed by mortals not coming within the classification of prophets.

Mr. Allen's testimony had nothing to do with the refusal. It was given under great disadvantage, without the assistance and protection of his counsel and without proper conference with Government counsel before he was placed on the stand. Much of the cross-examination was completely irrelevant in view of *Securities Commission v. U. S. Realty Co.*, *supra*. That case (p. 459) held Rule 24(2)

"plainly dispenses with any requirement that the intervenor shall have a direct or pecuniary interest in the subject of the litigation."

It was, therefore, proper that in our praecipe for transcript to this Court (R. 25) and in our praecipe for printing in this Court [R. 106 (c)], we did not include any directed omission of Mr. Allen's testimony; and in our view not proper that Cash in its praecipe [R. 28, par. 6, and 107(b)] should have caused this testimony to be included and printed. If it was to be included, the whole of it should have been printed, including the redirect which appears or should appear on page 115 of the typewritten transcript, as follows:

"Redirect Examination

"By Mr. Moyer:

Q. Mr. Allen, if National Cash Register should sell at cost, or at nearly cost, the Allen-Wales machines that they are acquiring, could you as an independent remain in business? A. No.

Q. You actually are fearful of being put out of business by the National Cash Register Company?

A. Absolutely.

Q. Who prepared the petition that you signed?

A. Mr. Bruce and I.

Q. Mr. Bruce is your attorney? A. That's right.

Q. Isn't it important to you and the other independent dealers that Allen-Wales' distributors remain in business? A. It certainly is.

Q. Outside of the group of independent dealers you have no choice but to develop your own distribution system by hired employees? A. That's right."

As to the possible inadequacy of the Government's representation of Allen, we have repeatedly stated its conscientiousness, but that it is likewise a possible deduction that when the Government requested Allen be allowed to intervene, it recognized that the opposition to Cash's petition would be more adequate. The Government answer did ask that the petition be dismissed. The Government's inadequate representation as an adversary and assumption of non-adversary attitude first became apparent when the stipulation was introduced in evidence. This stipulation indicated the Government was not going to call witnesses, but rely on letters from Allen-Wales dealers and Cash's answering statements thereto in place of evidence. Especially when the court expressed disapproval, the Government should have called witnesses, since one witness on the stand or in depositions could have given far more informative and persuasive testimony than all of the letters put together. If the court had allowed Allen, as promised, opportunity to present authorities after the close of the first day's session, Allen could then have pointed out that it considered non-adversary representation and letters inadequate representation. As to the suggestion in the brief (p. 23) there was ample opportunity to confer with counsel for the Government before and during the hearing, we

deny that and the difference in non-adversary and adversary attitude would not be conducive to unified resistance.

Cash's brief (p. 12) asserts that the stock of the sellers was never in the custody of the court within Rule 24(a) (3). It was in the constructive custody of the court so far as concerns sale of it to Cash. When Cash applied for leave to buy it, then applicant was

"so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court. . . ."

Without attempting, in the brief time intervening before argument after receipt of Cash's brief, to dispute all of its arguments in this Court as to why intervention should not have been allowed, we mention that many of these reasons are afterthought's and not objections presented when intervention was sought. Hence, they should not be noticed here. *United Railways Co. v. West*, 280 U. S. 234; *Patrick v. Graham*, 132 U. S. 627.

COMMENTS ON GOVERNMENT'S BRIEF

Since sending the above brief to the printer, we have received this Friday, March 24, page proof of brief for the United States and have, therefore, but a few moments for comment on that.

The record references 43 and 93 in the first line of page 8 are incorrect. Actually, the only exhibits offered by the Government were of an inconsequential character, as follows:

NUMBER

- 101 Agency Manager's Contract, The National Cash Register Company
- 103 Photostatic copy letter June 5, 1940, from Allen-Wales Adding Machine Corporation to all Allen-Wales Dealers and Distributors

NUMBER

- 104 Allen-Wales Catalogue Adding Machines
- 105 Folder containing photostatic copy of Statements by Dealers of Allen-Wales Adding Machine Corporation
- 106 Folder marked "Adding Machine Distribution Systems"
- 107 Statement received from Allen-Wales Adding Machine Corporation stating its annual volume in dollars and units for adding machines, bookkeeping machines and cash drawer machines from January 1, 1933, to May 31, 1943
- 108 Price List (U. S.) of National Cash Register Company.

We notice that the Government's brief has nothing to say regarding our criticism of the introduction of letters aspersed by the court, instead of testimony.

The Government says (Br. p. 11 top) there is no unconditional right to intervene under Section 16 of the Clayton Act

"in proceedings by the United States to enforce the anti-trust laws"

or (p. 10 top)

"in injunctive suits brought by the United States to enforce the provisions of the Sherman Act."

But this proceeding is not such. The intervention is sought where a petition of the offender has been brought seeking to modify the injunction decree in a way that will injure the proposed intervénor, such decree being broader in its protection than the provisions of the Sherman, Clayton or Federal Trade Acts. Since no other court than the court which passed the decree can modify it as the petitioner, Cash, desires, since Section 16 of the Clayton Act does not permit injunctions against executed transactions, since

no other court than the one in which intervention is sought can give proposed intervenor the relief of refusal to modify its decree, and since intervenor will not be able to resort successfully to any other court for protection under the decree after the court which passed it has modified it and retained continuing jurisdiction, Allen is, we assert, entitled to intervention of right.

The cases cited in the note on page 10 do not touch this question and are not opposed to what has just been stated. *Ex parte Tobacco Board of Trade*, 222 U. S. 578, was a petition for mandamus in this Court to permit intervention after decree. The reasons for refusing relief in mandamus under the circumstances of that case, wholly different from ours, make the decision not germane to the issues here. In *United States v. Columbia, Etc., Corp.*, 27 F. Supp. 116, there was about three years delay in seeking intervention and the case turned largely on that. Moreover, there the Government opposed intervention, whereas here it consents thereto.

In *United States v. Columbia, Etc., Corp.*, 28 F. Supp. 168, it appears, p. 170, there was no claim of intervention of right. The city seeking intervention wished to raise issues wholly outside the scope of the original case, such issues being the proper rates to be charged gas users. That was a ground for refusing intervention. In the same case, 108 F. (2d) 614 (wrongly stated in Government brief as p. 618), the appeal to the Circuit Court of Appeals was dismissed for want of jurisdiction in that court, the holding being that appeal should run, as it has been taken in this case, to this Court.

The Government contended in the court below and still believes (p. 41) appellant should have been allowed to intervene. Without protracting the discussion of the "refinements" of Rule 24 as to intervention of right and permissive intervention, there was an abuse of discretion in

this case. The court granted conditional intervention, promised the intervenor opportunity to cite authorities in support of its position, then revoked the allowance of tentative intervention and, without any apparent reason except a mistaken view of the law, denied intervention. It did not, as required by Rule 24(b), last sentence, if 24(b) was the applicable rule,

“consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

Respectfully submitted,

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CHARLES ELMORE GUMPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

vs.

**THE NATIONAL CASH REGISTER COMPANY AND
THE UNITED STATES OF AMERICA.**

**APPEAL FROM THE DISTRICT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF OHIO.**

**STATEMENT OPPOSING JURISDICTION AND MO-
TION TO DISMISS OR AFFIRM BY APPELLEE, THE
NATIONAL CASH REGISTER COMPANY.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,

vs.

Appellant,

THE UNITED STATES OF AMERICA AND THE
NATIONAL CASH REGISTER COMPANY, ET AL.,

Appellees.

**STATEMENT ON BEHALF OF APPELLEE, THE NA-
TIONAL CASH REGISTER COMPANY, OPPOSING
JURISDICTION.**

In accordance with Rule 12 (Paragraph 3) of the Supreme Court of the United States, as amended, the appellee, The National Cash Register Company, submits herewith its statement disclosing matter and grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant, Allen Calculators, Inc., in its Jurisdictional Statement in support of its petition for appeal from the order of the District Court of the United States, Southern District of Ohio, Western Division, entered on November 16, 1943, denying the motion of the appellant, Allen Calculators, Inc., for leave to intervene in a proceeding arising from a petition filed by The National

Cash Register Company under the terms of final decree entered February 1, 1916, in the case of United States of America, Plaintiff, against The National Cash Register Company, et al., Defendants, in said Court (In Equity No. 6802).

I. Order Not Appealable.

This cause is one in equity brought by the United States against the appellee, The National Cash Register Company, and others under the Sherman Anti-Trust Law (Act of July 2, 1890, ch. 647, as amended). Therefore, under the provisions of the Expediting Act of February 11, 1903 (U. S. C. A. Title 15, Sec. 29), no appeal can be taken in this cause except to the Supreme Court from a final decree of the District Court.

Appellant is not a party to this cause. Therefore, the order denying it leave to intervene therein is not a final decree and is not appealable, either to the Supreme Court or to the Circuit Court of Appeals.

United States v. California Cooperative Canneries, 279 U. S. 553;

Missouri-Kansas Pipe Line Co. v. United States, et al., 108 Fed. (2d) 614; certiorari denied, 309 U. S. 687.

In the *California Canneries* case, the Supreme Court of the District of Columbia had denied leave to California Cooperative Canneries to intervene in a proceeding in that Court to vacate a consent decree previously entered in an anti-trust suit commenced by the United States; and Canneries appealed from that order to the Court of Appeals of the District of Columbia, which reversed the order. On certiorari to the Supreme Court, to review an order of the Court of Appeals refusing to set aside its order of reversal, the Supreme Court reversed, holding that the Court of Appeals had no jurisdiction to entertain the order

denying intervention. In delivering the opinion of the Court, Mr. Justice Brandeis said (pp. 558-9):

“* * * These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act ‘in which the United States is complainant,’ the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins v. Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree. * * * The purpose of Congress to expedite such suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene.”

In the *Missouri-Kansas Pipe Line Co.* case, the Circuit Court of Appeals, Third Circuit, dismissed appeals from orders of the District Court of Delaware, denying motions to intervene in proceedings in an anti-trust suit, relying on the decision of the Supreme Court in the *California Co-operative Canneries* case, and the Supreme Court denied certiorari (309 U. S. 687).

In its jurisdictional statement, appellant relies on the decision of the Supreme Court in *Missouri-Kansas Pipe Line Co. v. United States* (312 U. S. 502), in which an appeal by the Panhandle Eastern Pipe Line Company from an order denying its application for intervention was reversed. In that decision, however, the Supreme Court distinguished the *California Canneries* case and pointed out that the decree in the anti-trust suit specifically conferred certain rights on the Panhandle Company and provided that, upon proper application, it could become a party to the suit for the purpose of enforcing those rights. The court did not question the general rule that orders denying inter-

vention are not appealable, and placed its decision squarely on the rights given to this particular intervenor by the decree, saying (p. 508) :

“ * * * To enforce the rights conferred by Section IV was the purpose of the motion. Therefore, the codification of general doctrines of intervention contained in Rule 24 (a) does not touch our problem. And since the protection afforded Panhandle by Section IV of the decree could only be secured by the remedy designed by Section V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable.”

It is important to note, furthermore, that the Court at that time had before it for decision two appeals. A motion for leave to intervene was made by Missouri-Kansas Pipe Line Company on behalf of itself because of its ownership of more than 40% of the Panhandle Company's stock. The other motion for leave to intervene was made on behalf of Panhandle and in its name pursuant to the following specific provision of the decree:

“That jurisdiction of this cause and of the parties hereto is retained for the purpose of giving full effect to this decree and for the enforcement of strict compliance herewith and the punishment of evasions hereof, and for the further purpose of making such other and further orders and decrees or taking such other action as may from time to time be necessary to the carrying out hereof; and that Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof.”

The court affirmed the order denying Missouri-Kansas Pipe Line Company leave to intervene and reversed the order denying leave to the Panhandle Company. The court rested its decision solely upon the specific provision of the decree.

Appellant, Allen Calculators, Inc., certainly has no better rights on this appeal than Missouri-Kansas Pipe Line Company had on its appeal. It seeks, however, to bring its appeal within the principle of the *Pipe Line* case by arguing that it is a competitor of the appellee and that the original decree in this suit was designed to safeguard the interests of such competitors and "to protect the economic independence of persons not parties to the suit", and that therefore intervention should be granted as a matter of right. If that were so, intervention "as a matter of right" would have to be permitted to innumerable private parties in nearly every suit brought by the United States to enforce the Anti-Trust Laws. Clearly, the Supreme Court did not intend to establish any such principle by its decision in the *Pipe Line* case, being careful to base it on specific rights given to the Panhandle Company in the original decree and emphasizing that, in denying it the right to enforce those rights, the District Court made a final and definitive adjudication, which was appealable.

The general rule has long been recognized that the granting or denial of an application of someone who is not an original party to a suit to intervene therein is within the discretion of the trial court, except where intervention is a matter of right under express provisions of a statute or rule of court; and this is particularly true in cases where the person who seeks to intervene is one of a class whose interests are represented by a public officer or governmental body.

In re Engelhard, 231 U. S. 646;

City of New York v. Consolidated Gas Co., 253 U. S. 219;

City of New York v. New York Telephone Co., 261 U. S.

312.

The appellant also cites, in its jurisdictional statement, the case of *United States v. Swift & Co.* (286 U. S. 106).

That case, however, has no application, because it involved an appeal from a final decree by an intervenor who had been permitted to intervene in the District Court; and it is well settled that an appeal by one who was permitted to intervene, like an appeal by one of the original parties, must be taken direct to the Supreme Court under the Expediting Act.

U. S. v. California Cooperative Canneries Co., 279 U. S. 553, 559.

II. Appellant Not Entitled to Intervene as a Matter of Right.

The appellant contends that it was entitled to intervene as a matter of right under Rule 24(a) (2) and (3) of the Federal Rules of Civil Procedure, which are as follows:

“(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:
 * * * (2) when the representation of the applicant’s interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.”

1. The contention under Rule 24 (a) (3) is clearly unsound and without merit. It seems to have been somewhat of an afterthought, being set forth in appellant’s Supplemental Jurisdictional Statement, filed after the entry of the Findings and Order of the District Court on December 7, 1943, although it is mentioned as a ground for intervention in the original Jurisdictional Statement (p. 10).

No “distribution or other disposition of property in the custody of the court or of an officer thereof” was involved in this proceeding. It was an application by the appellee, The National Cash Register Company, one of the defend-

ants in this suit, for permission to acquire the stock of the Allen-Wales Adding Machine Corporation, pursuant to a provision (Second, (p)) of the final decree entered in this suit on February 1, 1916. The stock of the Allen-Wales Adding Machine Corporation was not, and never has been, in the custody of the court or of an officer thereof. Some of the owners of the stock made a contract to sell their shares to the National Cash Register Company, and to endeavor to have other stockholders do the same, subject to the National Cash Register Company's obtaining approval of the purchase from the District Court, in accordance with the terms of the said final decree. The appellant has no ownership or other interest in the stock of the Allen-Wales Adding Machine Corporation.

2. The appellant's contention that it was entitled to intervene under Rule 24 (a) (2) is equally unsound. Its argument is that it is a competitor of the National Cash Register Company and, therefore, has an interest in the proceeding, representation of which by the United States is or may be inadequate, and that it is or may be bound by the order or judgment of the District Court.

As hereinbefore pointed out, there would be almost no limit to the parties who would have a right to intervene in suits by the United States to enforce the anti-trust laws, if any competitor of one of the defendants had that right. According to the appellant, the mere assertion that he was a competitor, by a person seeking to intervene in such a suit, would compel the court to grant intervention, because the appellant's Jurisdictional Statement contains no factual allegations as to the extent of the competition between appellant and appellee.

The evidence adduced at the hearing in the District Court, on the application of the National Cash Register Company to acquire the stock of the Allen-Wales Adding Machine

Corporation, showed conclusively that no substantial competition has heretofore existed between the National Cash Register Company and the Allen-Wales Adding Machine Corporation and that the acquisition of the latter by the former would supplement its business and was desired for that purpose and would not substantially lessen competition. More than 94% of the business of the Allen-Wales Corporation was the manufacture and sale of adding machines, which the National Cash Register Company had never manufactured or sold, but which it desired to add to its line of cash registers and accounting machines.

It also appeared that the appellant, Allen Calculators, Inc., was a competitor of the Allen-Wales Corporation in the adding machine business and competed with the National Cash Register Company only to the extent that its cash drawer adding machines competed with cash registers. The competition which has heretofore existed between the cash drawer machines of the appellant, Allen Calculators, Inc., and cash registers of the National Cash Register Company can in no way be affected by the acquisition of the Allen-Wales Adding Machine Corporation by the National Cash Register Company. However, Allen Calculators, Inc., will have a new competitor in the adding machine field, or, more accurately, one of its present competitors in that field, the Allen-Wales Corporation, will become a stronger competitor by reason of its affiliation with the National Cash Register Company.

The testimony given at the hearing by Mr. R. C. Allen, President of the appellant Allen Calculators, Inc., shows that what he was concerned about was, not that the acquisition of Allen-Wales by National would lessen competition, either in cash registers or in adding machines, but that he would have to meet stronger competition in the adding machine business.

The points raised in appellant's Jurisdictional Statement and in the Answer which it asked leave to file as intervenor, were fully presented to the District Court by the Attorney General on behalf of the United States. As required by the final decree of February 1, 1916, the National Cash Register Company gave the Attorney General notice, more than sixty days prior to the hearing, of the filing of its petition for permission to acquire the stock of the Allen-Wales Corporation; and it was conceded at the hearing that it had informally furnished the Attorney General with a copy of the petition more than thirty days before filing; and it also furnished the Attorney General with copies of the contract of purchase and a large amount of material relating to its business and that of the Allen-Wales Corporation, prior to the hearing.

The hearing in the District Court consumed a full court day for the taking of testimony and offering of exhibits, and another half day for argument of counsel; the typewritten transcript of the hearing consists of 168 pages. Numerous charts and other exhibits were introduced in regard to the volume of business in cash registers, adding machines and accounting machines of the National Cash Register Company, the Allen-Wales Adding Machine Corporation and the other principal companies in the office equipment business, as well as the functions of the various types of machines they produce. The Government cross-examined at length the witnesses called on behalf of the National Cash Register Company, and itself called Mr. R. C. Allen, President of the appellant, as a witness, and it introduced numerous exhibits in regard to the business methods, and particularly the systems of distribution, of the National Cash Register Company, the Allen-Wales Corporation and other companies in the business machine field.

The Government brought out fully all facts relating to any possible competition between the National Cash Register Company and the Allen-Wales Corporation, both existing and potential, and it argued strongly that, even if existing competition was slight, potential competition might be substantial.

The Government also presented to the Court at great length its position that the maintenance of "competition at distribution level," particularly among independent dealers and distributors, was in the public interest.

There are no other points remotely relevant to the proceeding which are suggested by the appellant; and no ground is suggested in appellant's Jurisdictional Statements to support its contention that the representation of any possible interest it might have, and the interest of the public, were not adequately and competently represented by the Government.

The only specific criticism of the Government's representation, contained in appellant's Jurisdictional Statement, is that the Attorney General introduced in evidence a number of letters which had been received from Allen-Wales dealers and distributors, in answer to questionnaires sent to them by the Department of Justice, instead of calling such dealers and distributors as witnesses. Most of these letters, as might have been expected, were unfavorable to the acquisition of the Allen-Wales Corporation by the National Cash Register Company; but the attorneys for the National Cash Register Company agreed that they might be submitted to the court, even though not under oath and not subject to cross-examination, while reserving their right to object to the materiality and relevancy of their contents.

A copy of the Findings and Order of the District Court, entered on December 7, 1943, granting the application of

the National Cash Register Company, on certain terms and conditions, is annexed hereto marked "Schedule A." From this it appears that the District Court made careful findings of fact with respect to the nature and volume of the business of the National Cash Register Company and the Allen-Wales Adding Machine Corporation and the lack of competition between them. It further provided that the acquisition of the stock of the Allen-Wales Adding Machine Corporation should bind the National Cash Register Company to the performance of certain conditions for the protection and maintenance of the business of all existing Allen-Wales dealers and distributors, having found, as contended by the Attorney General, that "the preservation of such distributors and independent dealers as competitors in the field of distribution of business machines is a matter of public interest."

In appellant's Jurisdictional Statement it is said that the Government took the position, in argument, that its functions in the case were not those of an adversary but merely to present facts from which the Court could form its own independent conclusions. Although a statement to that effect was made in the closing argument on behalf of the Government, it is hardly consistent with the complete arguments and statements made at the hearing by the two Assistants to the Attorney General who represented the Government. They contended strongly throughout the hearing that the acquisition of the Allen-Wales Adding Machine Corporation by the National Cash Register Company would tend to suppress competition in the office equipment business "at the distribution level" and would eliminate substantial potential competition between the National Cash Register Company and the Allen-Wales Corporation and urged that the petition should be denied.

In attempting to bring itself within Rule 24 (a) (2), the appellant is also obliged to contend that it "is or may be bound by a judgment in the action."

There is no basis for that contention. Of course many members of the general public are affected in one way or another by court decisions in litigation in which they are not parties, particularly anti-trust suits, suits affecting the rates of public utilities and similar types of litigation. That, however, does not give any individual rate payer or alleged competitor or other person engaged in a business affected by anti-trust litigation, the right to intervene. In cases where the public interest is represented by a governmental officer or commission, charged with enforcing the law and protecting the public interest, intervention by private parties, even though they may have a direct and substantial interest in the result of the litigation, has uniformly been denied. Representation by the governmental authorities is considered adequate, in the absence of gross negligence or bad faith on their part.

In re Englehard & Sons, 231 U. S. 646, 650;

City of New York v. Consolidated Gas Co., 253 U. S. 219;

City of New York v. New York Telephone Co., 261 U. S. 312.

The appellant also asserts that a decision in this proceeding, without its being allowed to intervene, would deprive the appellant of any right under Section 16 of the Clayton Act to obtain injunctive relief. On the contrary, it is submitted that, if the appellant had been allowed to intervene, the decision of the District Court in this proceeding would have been binding upon it, but that, having been denied intervention, the appellant is deprived in no way of any rights that it may have under Section 16 of the Clayton Act.

to obtain injunctive relief against threatened loss or damage by violation of the Anti-Trust Laws. In this respect, appellant is in the same position as any other member of the public who was not a party to the suit.

III. Application Not Timely.

Intervention as of right under Rule 24 (a) is to be granted only "upon timely application".

The application of Allen Calculators, Inc., to intervene in this proceeding was made at the opening of court on November 15, 1943. The petition of the National Cash Register Company was filed on August 30, 1943, and notice of such filing was sent to the Attorney General on that date. The appellant's Jurisdictional Statement states that the papers in its motion for leave to intervene "had been served on counsel for The National Cash Register Company and the Government"; but it neglects to mention the time of service, which was within a half hour of the opening of court on November 15, 1943.

The transcript of the testimony shows that the Court, in denying intervention, gave consideration to the tardiness of the application and the inconvenience and damage that might be caused to the National Cash Register Company, as well as the stockholders of the Allen-Wales Adding Machine Corporation, by delays resulting from permitting another party to intervene at the last moment.

As hereinbefore stated, the National Cash Register Company and its attorneys had furnished a great quantity of material bearing on the case to the Attorney General, prior to the hearing. In order to expedite the hearing, the attorneys for the National Cash Register Company, and the Assistants to the Attorney General in charge of the case had prepared a stipulation covering many facts which were not in dispute, including numerous charts and tables show-

ing production and sales figures in the office equipment business. At the very outset of the taking of testimony, when this stipulation was presented to the Court, counsel for the appellant interjected himself into the proceedings and stated that he had not seen the stipulation and wanted to examine it before it was marked in evidence. This incident apparently influenced (quite properly) the learned District Judge in deciding that intervention by the appellant would serve no useful purpose and should be denied.

IV. Appeal Presents No Substantial Question. It Raises Only a Moot Question.

1. It has been shown that all the objections made by appellant, in its Jurisdictional Statement, to the acquisition of the stock of the Allen-Wales Adding Machine Corporation by the National Cash Register Company, were raised and urged by the Attorney General and duly considered by the District Court. The Findings and Order of the District Court, entered on December 7, 1943, also show that the evidence was thoroughly examined and that great care was taken by the Court, in granting the petition of the National Cash Register Company, to protect the public interest in preserving competition in the business machine field, "at distribution level", among independent dealers and distributors.

No other competitor of the National Cash Register Company or the Allen-Wales Adding Machine Corporation or of the general public sought to intervene. Appellant has not shown any way in which it might have been helpful to the Court or to the Attorney General, in protecting the public interest, by participating in the proceeding. The only result of permitting appellant to intervene would have been to prolong and delay the hearing, for which the Assistants of the Attorney General, who represented the Govern-

ment, had spent several months in preparation. Such delay might have had the effect of blocking the sale of the Allen-Wales Corporation's stock to the National Cash Register Company, without producing any good reason for the Court's refusing its approval of the transaction. Under the contract of purchase, the Sellers of the stock had a right to cancel if the sale could not be completed during the calendar year 1943, and obstructive tactics by the appellant might easily have caused great damage both to the National Cash Register Company and to the stockholders of the Allen-Wales Adding Machine Corporation.

2. As stated in appellant's Supplemental Jurisdictional Statement, the appellant attempted to take this appeal on a cost bond in the nominal sum of \$250. The amount of the bond fixed by the Court was \$1,000; but the bond is still only a bond for costs, and the District Court inserted in the Order allowing the appeal that nothing contained therein "shall be deemed or construed to stay or supersede in any way the Findings and Order entered herein on the 7th day of December, 1943".

Accordingly, there has been no stay of the Order entered December 7, 1943, permitting the National Cash Register Company to acquire part or all of the stock of the Allen-Wales Adding Machine Corporation; and since the entry of the said Order the National Cash Register Company has acquired, by purchase, all the outstanding stock of the Allen-Wales Corporation and has made payment therefor to the holders of such stock, more than fifty in number. Had it not done so promptly, its rights under the purchase agreement might have been lost.

A reversal, at this time, of the order denying intervention, could at most result in a reopening of the hearing before the District Court, and, even if the District Court

should be inclined to question the correctness of the Order entered on December 7, 1943, it would have to take into consideration the damage that might be caused by a change in that Order to the stockholders of the Allen-Wales Adding Machine Corporation, who have changed their position in reliance thereon, as well as to the National Cash Register Company.

The Supreme Court will not entertain an appeal where the question involved has become moot.

United States v. American-Asiatic Steamship Co., 242
U. S. 537.

Cincinnati, Ohio.

December 23, 1943:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,

vs.

Appellant,

**THE UNITED STATES OF AMERICA, AND THE
NATIONAL CASH REGISTER COMPANY, ET AL.,**

Appellees.

**MOTION TO DISMISS OR AFFIRM BY APPELLEE,
THE NATIONAL CASH REGISTER COMPANY.**

Appellee, The National Cash Register Company, moves on the grounds below stated that the appeal by Allen Calculators, Inc. be dismissed or that the order of the United States District Court for the Southern District of Ohio, Western Division, denying leave to the said Allen Calculators, Inc., to intervene, to file an answer and to participate in the hearing on this cause in the District Court be affirmed:

1. The order appealed from is not appealable because it is not a final order or decree, and the cause is one in equity brought by the United States under the Sherman Anti-Trust Law;

2. Appellant was not entitled to intervene as a matter of right and, therefore, the court's denial was discretionary

and is not appealable because no reason for reviewing the court's exercise of discretion has been set forth by appellant;

3. Appellant's application to intervene, to file an answer and to participate in the hearing was not timely because it was made at the opening of the hearing without prior notice to Appellee; and

4. No substantial question is presented by the appeal. It raises only a moot question.

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(i)

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC., APPELLANT

v.

**THE NATIONAL CASH REGISTER COMPANY AND THE
UNITED STATES OF AMERICA**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF OHIO**

BRIEF FOR THE UNITED STATES

OPINION BELOW

No opinion was rendered by the district court.

JURISDICTION

On November 16, 1943, the district court entered an order (R. 16) overruling appellant's motion for leave to intervene in a proceeding arising from the petition of appellee National Cash Register Company for permission to take certain action pursuant to the provisions of a final decree entered against it in an equity proceeding under the Sherman Act brought by the United States. A petition for appeal was filed on

December 4, 1943, and was allowed on December 10, 1943 (R. 23-25).

The jurisdiction of this Court is invoked under Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. sec. 345, and under the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. sec. 29. This Court postponed the question of its jurisdiction to the hearing on the merits (R. 108).

QUESTIONS PRESENTED

The Government is interested in this case because of the importance to it of the principles governing intervention of private parties in government antitrust litigation. In addition, the Government wishes to make clear the position it took in the district court, which appellant treats as of some consequence. Accordingly, the only points considered in this brief are:

- (1) Whether the position of the Government in the district court was that of an adverse party.
- (2) Whether appellant was entitled to intervene.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 24 of the Rules of Civil Procedure provides in part:

- (a) *Intervention of Right*.—Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when

the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) *Permissive Intervention.* — Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

STATEMENT

On February 1, 1916, a consent decree was entered in the district court in a suit brought by the United States under Sections 1 and 2 of the Sherman Act against the National Cash Register Company (referred to herein as Cash Register) and others (R. 1). Paragraph Second, subdivision (p), of the decree prohibits Cash Register from acquiring ownership or control of the business or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices, but provides that in case any such acquisition is desired:

a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right (R. 5-6).

In August 1943 Cash Register, pursuant to the above provision, filed a petition with the district court for leave to acquire all or a majority of the stock of the Allen-Wales Adding Machine Corporation (referred to herein as Allen-Wales). The petition alleged that 94% of the business of Allen-Wales, other than war production, consisted in the manufacture and sale of adding machines, that Cash Register did not manufacture or sell adding machines as such, and that there was no substantial competition between the two companies (R. 6-12). Notice of the petition was served upon the Attorney General as prescribed by subdivision (p) (R. 13).

The United States filed an answer requesting that the petition be denied. The grounds of its opposition were that the acquisition would (1) eliminate competition between the cash registers

of Cash Register and the cash drawers of Allen-Wales and between these companies in bookkeeping machines, (2) eliminate potential competition between these companies in adding machines, (3) eliminate competition at the distribution level by cutting off Allen-Wales as a source of supply for independent distributors of business machines and jeopardize the continuance of such distributors as sales outlets for other manufacturers, and (4) would have the same effects on competition and prospective competition as certain practices charged in the complaint upon which the consent decree of February 1, 1916, was based (R. 14-16).

The Government and Cash Register entered into a stipulation as to various facts (R. 45-47). The stipulation also provided that the Government might present to the court replies received by the Department of Justice from a questionnaire which it had sent to dealers handling Allen-Wales products and that Cash Register would not object to such evidence upon the ground of hearsay or incompetency.

At the opening of the hearing the appellant moved for permission to intervene (R. 29). Counsel for the United States stated that it had no objection to the application to intervene, that it felt that the application came within Rule 24 (b) (2) of the Federal Rules of Civil Procedure providing for "permissive intervention" and should be granted (R. 29, 34). The motion for intervention, which was objected to by Cash Regis-

ter; was at first conditionally granted by the court but was finally rejected (R. 29, 30, 41-44).

The Government in its opening statement opposed the granting of Cash Register's petition (R. 72-74). The witnesses for Cash Register were cross-examined by the Government and, after appellant had been denied leave to intervene, the Government called appellant's president as a witness (R. 75-78). The Government at the close of the hearing again opposed granting Cash Register permission to acquire Allen-Wales stock (R. 85-104).

The court, following the hearing, entered a decree which granted the petition of Cash Register but provided that acquisition of Allen-Wales stock by Cash Register should bind it to the performance of certain conditions designed to protect dealers and distributors of Allen-Wales products and to maintain such distributors as outlets for the products of other business-machine manufacturers (R. 19-21). Neither the Government nor Cash Register has appealed from this judgment.

ARGUMENT

I

THE UNITED STATES TOOK AN ADVERSARY POSITION IN THE PROCEEDING IN THE DISTRICT COURT

Appellant's brief (pp. 9-10, 18, 22) refers repeatedly to the Government's position in the proceeding below as having been "non-adversary."

and argues from this assumption the inadequacy of the Government's representation of appellant's interests. We think the Court should be given an accurate statement of the position which the Government took.

It is true that counsel for the Government interpolated in his final argument (R. 86) that he did not think the proceeding should properly be regarded as an adversary one, and that "we of the Department of Justice are in effect acting as commissioners in presenting to this Court information and data upon which the Court can act".¹

But these statements did not prevent Government counsel from opposing Cash Register's petition at every stage of the proceeding. The Government opposed the petition in its answer, in its opening statement to the court, and in its closing argument (*supra*, pp. 4-6). It queried those elements of the trade which it believed would probably be most seriously affected by the proposed acquisition and introduced the replies to this query as an exhibit (R. 37-39; Gov. Ex. 105, R. 49-54).

¹ These statements were made with express reference to paragraph Second, subdivision (p), of the 1916 decree which vests in the court jurisdiction to permit acquisitions which the decree otherwise prohibits "if the Court upon investigation into all the circumstances of the case" and after 60 days' prior notice to the Attorney General "shall determine" that the acquisition will supplement Cash Register's plant, machines or facilities and that it is desired for this purpose and will not substantially lessen competition.

It introduced six other exhibits (see R. 39, 43, 93), cross-examined Cash Register's witnesses, and called the president of appellant as its own witness (*supra*, p. 6). The Government emphasized the recent incipency, rapid growth, and real competitive nature of the Allen-Wales adding cash drawer, and that the acquisition of Allen-Wales would remove the largest of the independent competitors in the industry (R. 14, 15-16, 47, 90, 92, 98). Indeed, the district court stated in this connection (R. 32):

This is kind of a semi-government proceeding in which the Government, on behalf of everybody, is opposing the confirmation of this sale.²

It is to be noted that as a result of the Government's opposition to the acquisition of Allen-Wales by Cash Register, the court in its order imposed conditions continuing the availability of Allen-Wales machines to distributors for a period of at least five years of normal production and of parts for a period of at least ten years of normal production, and also retained jurisdiction to permit Allen-Wales distributors to secure compliance by Cash Register with the conditions of the order (R. 18-22).

² The court at a later point in the Government's closing argument, said (R. 99):

"I don't see what else you could furnish. I think the statistics right down to the minute have been furnished, and I don't see what else the Government could do to add to the case."

The position taken by the Government is to be judged by its pleadings, general conduct of the case, and the effect of the entire argument which it addressed to the court, and not by any single remark of counsel in closing argument taken out of its context. The proceeding as a whole was conducted on an adversary basis, as will be plain from an examination of the record. The obvious purpose of the statement to which appellant refers was to point out that in this type of proceeding Government counsel, to a greater extent than private attorneys, act as officers of the court.

II

APPELLANT'S RIGHT TO INTERVENE

Rule 24 (a) of the Rules of Civil Procedure states the circumstances under which there may be intervention as of right. We submit that it is clear that the present case does not fall within any of these categories.

The rule permits intervention of right "(1) when a statute of the United States confers an unconditional right to intervene". There is no such statute applicable to the present case. While Section 16 of the Clayton Act (15 U. S. C. sec. 26) authorizes private parties to sue for injunctive relief in the federal courts against threatened damage by reason of a violation of the antitrust laws, this section clearly does not grant a right, much less an "unconditional" right, to intervene

in injunctive suits brought by the United States to enforce the provisions of the Sherman Act.

Likewise this case is not within that part of Rule 24 (a) reading "(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action". Appellant was not a party to the proceeding and could not be bound by the court's judgment. It is therefore unnecessary to consider whether the appellant had an "interest" in the litigation within the meaning of the rule or whether, if so, representation of this interest by the Government was or might be inadequate.

In the instant case there was no property in the custody of the court or of one of its officers and the case does not fall within the final provision of Rule 24 (a) reading "(3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof".

It has been uniformly held that there can be no intervention as of right in a case of this character.² Furthermore, an unconditional right of

² *Ex parte Tobacco Board of Trade*, 222 U. S. 578; *United States v. Columbia Gas & Electric Corp.* (D. C. Del.), 27 F. Supp. 116, appeal dismissed for lack of jurisdiction, 108 F. (2d) 614; certiorari denied, 309 U. S. 687; *United States v. Columbia Gas & Electric Corp.* (D. C. Del.), 28 F. Supp. 168, appeal dismissed for lack of jurisdiction, 108 F. (2d) 614 (C. C. A. 3) certiorari denied, 309 U. S. 687. Cf. *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502.

intervention, in proceedings by the United States to enforce the antitrust laws, on the part of all persons whose economic interests might be affected by the outcome of the Government proceeding, would open the door to delaying interventions and might seriously interfere with the orderly disposition of such litigation.

While the Government contends that there is not, and should not be, any absolute right of intervention in a suit by the Government to enforce the antitrust laws, it believes that Rule 24 (b), under which allowance of intervention rests in the discretion of the court, safeguards against obstructive or unwarranted intervention. Here, appellant's position certainly raised questions in common with those which were in issue between the Government and Cash Register, within the meaning of Rule 24 (b) (2). Intervention here was consented to by the Government, and presumably would not have obstructed the proper protection of the public interest. Under circumstances such as those presented in the instant case, the Government believes that Rule 24 (b) (2) should be given a liberal interpretation in favor of intervention, and that appellant should have been allowed to intervene. It does not follow, of course, that the denial of appellant's application was an abuse of discretion, and the Government takes no position as to whether the court's

order denying intervention constituted reversible error. Cf. *Missouri-Kansas Pipeline Co. v. United States*, 312 U. S. 502, 506.

Respectfully submitted.

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MARCH 1944.



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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

vs.

THE NATIONAL CASH REGISTER COMPANY

and THE UNITED STATES OF AMERICA,

Appellees.

**BRIEF FOR APPELLEE, THE NATIONAL
CASH REGISTER COMPANY**

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Washington, March 21, 1944.



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Supreme Court of the United States

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

vs.

THE NATIONAL CASH REGISTER COMPANY
and THE UNITED STATES OF AMERICA,

Appellees.

BRIEF FOR APPELLEE, THE NATIONAL CASH REGISTER COMPANY.

Statement.

Appeal from an order (R. 16) of the District Court of the United States, Southern District of Ohio, Western Division, filed November 16, 1943, overruling a motion of the appellant, Allen Calculators, Inc., for leave to intervene and file an answer in a proceeding pending in the said court under a provision of a final decree entered February 1, 1916, in the case of United States of America, Plaintiff, vs. The National Cash Register Company, et al., Defendants (In Equity No. 6802).

The appellee, The National Cash Register Company (hereinafter referred to as "National"), filed in this Court, with a statement opposing jurisdiction, a motion to dismiss or affirm. By an order filed February 7, 1944 (R. 108), this Court postponed further consideration of the question of jurisdiction to the hearing on the merits and transferred the case to the summary docket.

The Proceeding in which Intervention was Sought.

The appellant, Allen Calculators, Inc., made its motion for leave to intervene (R. 55) in a proceeding instituted by the appellee, National, under the provisions of Article Second (p) of a final decree entered on February 1, 1916 in a suit in equity (No. 6802) entitled "The United States of America, Plaintiff, vs. The National Cash Register Company, et al., Defendants".

That suit was one under the Sherman Anti-Trust Act; and the final decree (R. 1-6), which was entered on consent, found that National and certain of the other defendants had combined to restrain and had attempted to monopolize interstate and foreign trade and commerce in cash registers in violation of Sections 1 and 2 of the Anti-Trust Act of July 2, 1890, by means of certain acts, enumerated in Article Second of the decree, which were thereby enjoined. The last paragraph of Article Second of the decree enjoined National, as follows:

“(p) From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce; Provided, that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right.”

Under the provision of the decree above quoted, National, on August 30, 1943, filed a petition (R. 6-12) in which it asked that it be permitted to acquire all or not less than 95% of the common stock and all or not less than 50% of the preferred stock of Allen-Wales Adding Machine Corporation (hereinafter referred to as "Allen-Wales"), on the ground that such acquisition would supplement the plant, patents, machines and facilities of the petitioner and was desired for that purpose and would not substantially lessen competition (R. 12).

A copy of the petition with notice of filing was served on the Attorney General of the United States on or about September 2, 1943 (R. 13). The answer of the United States to the petition, requesting that the same be denied, was filed on November 11, 1943 (R. 14-16).

The proceeding came on for hearing in the District Court on November 15, 1943. The appellant presented its motion for leave to intervene at the opening of the hearing, having served its notice of motion (R. 55) and proposed answer to the petition (R. 56-64), verified on that date (R. 64), on the attorneys for the Government and National shortly before the court convened (R. 29).

Although the court originally permitted the intervention "conditionally" (R. 30) and allowed counsel for the appellant to make an opening statement and to take some part in the proceedings (R. 30-36), it ruled subsequently that the appellant would not be allowed to intervene (p. 40). At the opening of the second day of the hearing, on November 16, the court announced that it would enter an order denying intervention, without stating therein the reasons for doing so (R. 41-44); and later, on the same day, the order appealed from was filed (R. 16).

In the course of the hearing, counsel for the Government, representing the general public, raised every material point, having any basis in fact, suggested by the appellant as a ground for denying National's application for permission to acquire the Allen-Wales stock. The issues were argued at length by counsel for the Government and counsel for National and were carefully considered by the court.

On December 7, 1943, an order of the District Court was filed (R. 17-22), authorizing and permitting National to acquire the assets and business of Allen-Wales, through the purchase of all or part of its outstanding stock, with the proviso that such acquisition should bind National to the performance of certain conditions. The order also provided that jurisdiction was retained to enforce or modify the same and to enable the Attorney General or the petitioner (National) or any dealer or distributor of Allen-Wales to make applications to the court in connection therewith, and it directed that representatives of the Department of Justice should have access to the books and records of National and should be entitled to interview its officers and employees and to receive reports necessary for the enforcement of the order, and it also provided that the final decree of February 1, 1916 should remain in full force and effect.

In its order of December 7, 1943, the District Court made specific findings with respect to the business of National and Allen-Wales (R. 18-19). These included findings that more than 94% of the business of Allen-Wales consisted of the manufacture and sale of adding machines; that National had not engaged in the manufacture or sale of adding machines (except for an insignificant number of converted accounting machines), while its principal competitors in cash registers and accounting machines did manufacture and sell adding machines; that the competition between the accounting machines and cash registers of National and the 5.8% of the business of Allen-Wales in commercial bookkeeping machines and combination adding-cash drawer machines was not substantial; and that the acquisition by National of the stock of the Allen-Wales would not substantially lessen competition upon compliance with the conditions contained in the order.

The conditions referred to (R. 19-21) are elaborate and provide, in substance, that all independent dealers and distributors of products of Allen-Wales shall continue to be permitted to handle such products, as if Allen-Wales were continuing to exist as an independently owned corporation, until at least January 1, 1950, that parts for repairing or

servicing such products shall be made available to them, until at least January 1, 1954, and that no unfair or unreasonable discrimination shall be practiced against such dealers and distributors.

Summary of Argument.

The appellee contends that the order appealed from should be affirmed or the appeal dismissed, for the following reasons:

- I. The granting or refusal of the application to intervene was within the discretion of the District Court, because the appellant was not entitled to intervene as of right under Rule 24(a) of the Federal Rules of Civil Practice.
 - (1) There was no statute conferring an unconditional right to intervene;
 - (2) The representation of appellant's interest by the Government was adequate; the Attorney General raised all material points suggested by appellant;
 - (3) Appellant would not be bound by a judgment;
 - (4) There was no property in the custody of the court or an officer thereof;
 - (5) The application was not timely;
 - (6) Case of Missouri-Kansas Pipe Line Co. v. United States (312 U. S. 502) is not applicable;
 - (7) There was no claim made in the court below that intervention was a matter of right.
- II. The action of the District Court in denying intervention was correct and involved no abuse of discretion. Full consideration was given to every material issue suggested by appellant.
- III. Jurisdiction is lacking because the order denying intervention, being discretionary, was not appealable.

POINTS.

FIRST

Appellant not entitled to intervene as of right under Rule 24(a) of the Federal Rules of Civil Practice. The order was discretionary.

The appellant contends (Brief, pp. 15-24) that it was entitled to intervene as a matter of right under Rule 24(a) of the Rules of Civil Practice. It did not make this contention in the lower court.

Rule 24 provides as follows, with respect to intervention of right:

“(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.”

The appellant does not bring itself within any of the provisions of Rule 24(a) relating to intervention as of right.

1. Right to intervene not conferred by statute.

There is no statute of the United States which conferred on the appellant “an unconditional right to intervene” in the proceeding in the lower court.

The only statute the appellant is able to suggest as applicable is Section 16 of the Clayton Act giving a right to injunctive relief against injury which may be sustained by a threatened violation of the anti-trust laws.

Appellant's argument (Brief, pp. 16-17, 20-21), so far as it is understandable to us, seems to be that, because Section 16 of the Clayton Act provides for injunctive relief, it should be construed as permitting anyone who asserts an interest in an injunction obtained by the Government to participate in any proceedings relating to the enforcement or modification of such injunction. Since the Clayton Act contains no language remotely justifying that construction, appellant's theory appears to be that the statute affords inadequate protection and that, therefore, the Court should read into it a new provision which Congress has not seen fit to enact. In other words, "There ought to be a law".

It is submitted that this theory is far from satisfying the requirement in Rule 24(a)(1) of "a statute of the United States (which) confers an unconditional right to intervene".

Absolute proof that Congress did not intend that Section 16 of the Clayton Act should confer upon appellant, or any one similarly situated, an absolute right to intervene in a proceeding in which the public as a whole was represented by the Attorney General, is found in Section 11 of that Act. This section confers upon the Federal Trade Commission, and other appropriate administrative bodies, the authority to enforce compliance with certain sections of the Act through proceedings to show cause why a "cease and desist" order should not be entered. This section specifically provides that "any person may make application, and, upon good cause shown, may be allowed by the Commission or Board, to intervene and appear in such proceedings". Having specifically provided for "permissive" intervention by private parties in proceedings before administrative tribunals under Section 11, it seems clear that the failure of Congress to provide for intervention in actions brought by the Attorney General in District Courts under Section 15, or to make any reference to intervention in Section 16, denies the existence of any such right.

2. Representation of Appellant's interest by Government was adequate.

Appellant's principal argument for the applicability of Rule 24(a) relates to subdivision (2) "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action".

On this point, the appellant is forced to argue (Brief, pp. 21-3) that, as a competitor of Allen-Wales and National, it had an interest in the proceeding, representation of which by the United States was or might be inadequate.

If this contention were sound, any private person or corporation could intervene as a party in any suit brought by the United States under the Anti-Trust Laws, on the mere assertion that the intervenor was a competitor and that its interests might be affected and might not be adequately represented by the Government. And such intervention would have to be allowed as a matter of right. It would not be a matter of discretion for the trial court.

Although nothing was brought to the attention of the trial court to indicate that the interests of the appellant, as well as the interests of the public generally, would not be adequately represented by the Government, it is apparent from the statements of the court hereinafter referred to (*post*, pp. 18-19) that it did consider this question and came to the conclusion that the appellant had no special interest in the proceeding distinguishing it from numerous other competitors in the field of business machines and office equipment and that the Government had made a thorough preparation for the hearing and a complete and adequate presentation of all facts and points of law which had any bearing on the propriety of permitting National to acquire the stock of Allen-Wales.

Although only a small part of the testimony and only one of the numerous and voluminous exhibits introduced by the parties, and a portion of another, appear in the printed record on this appeal, the record contains ample

material to demonstrate that the case was fully presented to the court. The elaborate findings and conditions contained in the District Court's order granting the petition of National (R. 17-22) show that the court gave the matter its most careful consideration and endeavored to give the fullest protection to the public and to the so-called "independent dealers and distributors" who might be affected.

It is not seriously suggested that the Anti-Trust Division of the Department of Justice is not competent to represent the public interest in an anti-trust suit or in a proceeding growing out of a decree in an anti-trust suit.

The appellant, however, attempts to make some point (Brief, pp. 9-10, 18) of a remark by one of the Assistants to the Attorney General, in his closing argument, that the Government did not regard itself as an "adversary" (R. 86). This "interpolation", as the Assistant to the Attorney General described it, must be read in connection with his entire closing argument (R. 85-104), and is hardly consistent with the position there taken by the Government nor with the answer filed by the Government (R. 14-16), which requested that the petition of National be denied.

The attorneys representing the Government contended strongly throughout the hearing that the acquisition of Allen-Wales by National would tend to suppress competition in the office equipment business "at the distribution level" and would eliminate substantial "potential" competition between National and Allen-Wales. These contentions received the careful consideration of the court, in the light of the evidence presented, and are covered by the findings and other provisions in the order which was subsequently entered (R. 17-22).

The only specific criticism made by the appellant of the Government's presentation of the case is the almost frivolous one that it introduced in evidence a large number of letters written to the Department of Justice by dealers and distributors of Allen-Wales products, instead of calling them as witnesses or taking their depositions (Brief, pp. 6, 22). Three of these letters appear in the record on this

appeal, together with the questionnaire sent out by the Department of Justice to which they were replies (R. 49-54). There were about twenty-two such letters which the Government asked the court to examine and which the court promised to read with care (R. 93), although the court originally expressed some hesitation about receiving them (R. 38-9). However, National waived any objection to these letters on the ground of hearsay or incompetency, reserving objection on the ground of irrelevancy and immateriality and the right to comment on their value because of lack of opportunity for cross-examination and in so far as they might contain expressions of opinion (R. 37, 47).

Obviously the Government was able, by this means, to present a quantity of material to the court, much of it the expression of opinion adverse to the position of National, which could not have been obtained by the examination of a few witnesses or without an inordinate expenditure of labor and money in taking depositions. The appellant does not suggest how it could have made a better presentation in this respect.

3. Appellant not "bound by a judgment."

In attempting to bring itself within Rule 24(a)(2) as having a right to intervene, the appellant is, of course, also obliged to argue that it "is or may be bound by a judgment in the action" (Brief, pp. 16-17, 22).

There is no basis for that contention. Many members of the general public are affected in one way or another by decisions in suits to which they are not parties, particularly anti-trust suits, suits affecting the rates of public utilities, and similar types of litigation. That, however, does not give individual rate payers or persons who may be affected by the result of anti-trust suits the right to intervene and become parties to such suits. In cases where the public interest is represented by a governmental officer or commission, charged with enforcing the law or protecting the public interest, intervention by private parties, even though they may have a substantial interest in the result

of the litigation, has uniformly been denied. Representation by the governmental authorities is presumed to be adequate, in the absence of gross negligence or bad faith on their part.

In re Engelhard, 231 U. S. 646, 651;

City of New York v. Consolidated Gas Co., 253 U. S. 219;

City of New York v. New York Telephone Co., 261 U. S. 312.

The appellant is in the same position as any other member of the public, including the numerous other manufacturers, dealers and distributors of office machines and equipment who are not, and who have not sought to become, parties to the suit. All such persons, including the appellant, retain their full rights under Section 16 of the Clayton Act, upon a proper showing of special interest, to obtain injunctive relief against threatened loss or damage by violation of the anti-trust laws. Furthermore, they retain their full rights under Section 4 of the Clayton Act to sue for treble damages, if able to prove that they have been damaged by a violation of the law.

As this court has reiterated time and again, the fundamental purpose of the Sherman and Clayton laws was to protect the public as a whole against monopolies. Although appellant may feel that its interest in this acquisition is greater than that of many other members of the public, it has no personal or private interest in the matter other than its interest, as one particular member of the public, in being protected against monopolies.

Section 15 of the Clayton Act specifically provides that "it shall be the duty of the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations". In the case at bar, the Attorney General, acting on behalf of the public as a whole, in performance of the duty imposed upon him by statute, sought to prevent a specific act, namely, the acquisition of Allen-Wales stock by National. The appel-

lant has no legitimate ground for complaint merely because it, as one member of the public, is thereby deprived of seeking to prevent the identical act through the injunctive relief provided by another section of the same statute.

City of New York v. New York Telephone Co.,
261 U. S. 312.

4. No property in the custody of the court.

It is also clear that the appellant is not "so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof".

Appellant's brief does contain an argument to the effect that this provision of the Rule is applicable (Appellant's Brief, pp. 16, 23-4); but it is submitted that this contention is too far-fetched to deserve serious consideration.

The proceeding in the District Court was instituted by National to obtain permission to acquire the stock of Allen-Wales; but that stock was not, and never has been, in the custody of the court or of an officer thereof. The owners of the stock had complete control of it and could dispose of it as they pleased; but National believed that it should not purchase the stock, without permission of the court, because of the injunctions against its doing certain acts contained in the decree of February 1, 1916.

5. Application not "timely."

Under Rule 24(a) (and also under Rule 24(b)) an application for intervention must be "timely".

The application of the appellant to intervene in this proceeding was made at the opening of court on November 15, 1943. The petition of National was filed on August 30, 1943, and notice of such filing was sent to the Attorney General on that date. Notice of the application to intervene was not served on the appellees until they were in the court room prepared to proceed with the hearing (R. 29).

The remarks of the District Court, hereinafter referred to (*post*, p. 18) show that consideration was given to the

tardiness of the application and the inconvenience and damage that might be caused to National, as well as to stockholders of Allen-Wales who had contracted to sell their stock, by delays resulting from permitting another party to intervene at the last moment.

National and its attorneys had furnished a great quantity of material bearing on the case to the Attorney General, prior to the hearing. In order to expedite the hearing, the attorneys for National and the Assistants to the Attorney General in charge of the case had prepared a stipulation covering many facts which were not in dispute, including numerous charts and tables showing production and sales figures in the office equipment business (R. 45-7).

At the very outset of the taking of testimony, when this stipulation was presented to the court, counsel for appellant interjected himself into the proceedings and stated that he had not seen the stipulation and wanted to examine it before it was marked in evidence (R. 35). Counsel for National remarked that this was why they were objecting to intervention. The court then announced that a recess would be taken shortly, at which time counsel could examine the stipulation. It is apparent that this incident quite properly influenced the learned District Judge in coming to the conclusion that intervention by the appellant would merely delay the proceedings and would serve no useful purpose.

In appellant's brief an attempt is made to excuse the tardiness of the application by saying that the answer of the Government to the petition was not filed until November 11. This is entirely immaterial, because the filing of an answer by the Government is not contemplated by the decree.

It is not stated that the appellant had not heard of the proceeding before that date; and it appeared that its attention had been called to the matter by the Anti-Trust Division of the Department of Justice many weeks before, because the Government, among its exhibits, introduced statements obtained from all companies in the adding machine field (which included appellant) in regard to their sales organizations and methods of distribution (R. 39, 41).

6. Missouri-Kansas Pipe Line Co. v. United States (312 U. S. 502).

In its effort to support the contention that intervention was a matter of right, even though none of the provisions of Rule 24(a) is applicable, the appellant relies on the decision of this Court in *Missouri-Kansas Pipe Line Co. v. United States* (312 U. S. 502).

That decision, however, was based squarely on the express provisions of the decree in the Government's anti-trust suit against Columbia Gas & Electric Corporation, which specifically gave certain rights to the Panhandle Eastern Pipe Line Company and further provided that "Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by § IV hereof". The application to intervene by Missouri-Kansas Pipe Line Co. (referred to in the opinion as "Mokan"), a stockholder of Panhandle Eastern, was made on behalf of Panhandle to enforce those rights; and this Court held that intervention was a matter of right under the terms of the decree, without regard to the provisions of Rule 24(a). In the opinion of the Court, Mr. Justice FRANKFURTER said (pp. 506, 508):

"All of these arguments misconceive the basis of the right now asserted. Its foundation is the consent decree. We are not here dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis. Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.

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Therefore, the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem. And since the protection afforded Panhandle by § IV of the decree could only be secured by the remedy designed by § V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable."

It should be noted that Mogan had previously made two applications to intervene on its own behalf, as a stockholder of Panhandle. Those applications were denied and appeals from the denials were dismissed by the Circuit Court of Appeals (108 F. (2d) 614), and this Court denied certiorari (309 U. S. 687). In referring to these earlier decisions, Mr. Justice FRANKFURTER said (p. 508):

"The denials are now urged as *res judicata*. But they were a rejection of Mogan's attempt to intervene in its own behalf. In neither instance was the relief denied deemed a mode of enforcing Panhandle's rights under §§ IV and V of the decree."

There was, of course, nothing in the decree in the National Cash Register case which gave any specific rights to the appellant; nor was there any provision that it might become a party to the suit for the purpose of enforcing such rights. The appellant was not even in existence when the decree against National was entered on February 1, 1916 (R. 75).

In appellant's brief (pp. 2-3) there is an attempt to extend the principle of the *Pipe Line* case to embrace the proposition that any person, not a party to the original anti-trust suit, should be granted intervention, as a matter of right, if the decree was designed to safeguard the interests of such person.

Clearly this Court did not intend to establish any such principle. It would mean that, in practically every suit brought by the United States to enforce the anti-trust laws, private corporations and individuals could intervene, as a matter of right, upon the mere assertion that their eco-

conomic interests might be affected in some way by the result of the suit.

Neither Rule 24(a) nor the decision of this Court in the *Missouri-Kansas Pipe Line* case has changed the well-settled principles as to when intervention must be allowed or may be permitted in a suit in equity. In discussing Rule 24, Dean Clark, Reporter to the Supreme Court Advisory Committee on the new Rules, is quoted as saying

"Intervention is another case where, by stating the rule more in detail, we have tried to cover the existing law without very substantial change, but more by way of clarification".

("Federal Rules of Civil Procedure; Proceedings of Institute; Washington and New York, 1938," published by the American Bar Association, p. 67.)

It has long been recognized that the granting or denial of an application by someone who was not an original party, to intervene in a suit in equity, is within the discretion of the trial court, except where intervention is a matter of right under express provisions of a statute or a rule of court.

Ex parte Cutting, 94 U. S. 14, 22;

Credits Commutation Co. v. U. S., 177 U. S. 311, 315;

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578, 581;

In re Engelhard, 231 U. S. 646, 651;

City of New York v. Consolidated Gas Co., 253 U. S. 219;

City of New York v. New York Telephone Co., 261 U. S. 312.

7. No claim in court below that intervention was a matter of right.

So far as appears from the papers filed by the appellant with the District Court, and from the oral arguments in

support of its application to intervene, the court received no intimation that the appellant was asserting a right, but obviously understood that permission to intervene was asked, as a matter of discretion.

The notice of motion (R. 55) stated that the appellant would move for an order "permitting Allen Calculators, Inc., to intervene herein upon the ground that the intervenor is engaged in commerce between the states and with foreign nations in adding machines, bookkeeping machines, calculators and cash register combinations, and that the proposed acquisition by National Cash Register Company of the stock in Allen-Wales Adding Machine Corporation will materially and unreasonably restrain interstate and international commerce in such articles of commerce and will tend to create a monopoly in National Cash Register Company in respect of such articles of commerce."

The appellant's proposed answer (R. 56-64) contained factual allegations and much argumentative and conclusory matter elaborating on this theme. There was no mention of any of the grounds for intervention as of right specified in Rule 24(a), and particularly no statement to the effect that representation of the appellant's interest by the Government was or might be inadequate.

Rule 24(c) requires that a motion to intervene "shall state the grounds therefor". Since the motion papers filed by the appellant in the District Court did not state that intervention was claimed as a matter of right under Rule 24(a), but indicated that the court was being asked to permit intervention in the exercise of its discretion, there was a failure to comply with the requirements of Rule 24(c), and the claim that intervention was a matter of right should not be considered on this appeal.

In the oral argument on the question of intervention (R. 29 *et seq.*) counsel for appellant did not hint that intervention was claimed as a matter of right. The only authorities referred to by counsel for the appellant were the Clayton Act (R. 35), the applicability of which is not obvious, and the case of *United States v. Swift & Co.* (286

U. S. 106) (R. 33), in which intervention had been permitted by the District Court.

One of the assistants to the Attorney General, appearing for the Government, urged the court to grant the application for intervention under Rule 24(b)(2), on the ground that the intervenor had a claim or defense in common with that of the Government (R. 29-34). This was, of course, an argument addressed to the discretion of the court. In fact, everything that was said by counsel representing the Government on the question of intervention indicated that, in their opinion, the decision of that question was within the discretion of the court; and appellant's counsel clearly indicated that he was appealing to the court to exercise its discretion in his favor. As a result, before any evidence was introduced, the court permitted intervention "conditionally" (R. 30). At one point the court remarked (R. 33):

"I will tell you—you see, you can advise with the Government and assist them in bringing out any points that you think will be helpful, but it just seems a little unusual in a matter between two private parties here, in which the Government intervenes, that you come in. I thought if you had some authorities—"

The following colloquy took place (R. 40):

The Court (to Mr. Moyer): Have you any other witnesses?

Mr. Moyer: We have no additional witnesses except Mr. Allen, unless Allen Calculators, Inc. is permitted to examine him first.

The Court: If Allen Calculators, Inc. is not permitted to intervene will you call him as your witness?

Mr. Moyer: What is the status of the intervenor at this time?

The Court: I would say that the intervention was received conditionally this morning, and I don't see anything that developed here. This is an original proceeding by the United States against the National Cash Register Company, and we are passing on the decree which grew out of the litigation at that time between

those parties. I think it would be unreasonable at this time to—

Mr. Moyer: —I will call Mr. Allen.

Mr. Seasongood: I understand your Honor rules we are not permitted to intervene.

The Court: Yes. As I say, the original proceeding was between the United States Government and the National Cash Register Company, and we are just considering the decree growing out of that litigation, and it would be unreasonable at this late date to permit intervention by your client. So you may have an exception and take such other position as you would want to, and if you later want to file a brief as a friend of the Court I don't see that there is any objection to that.

Mr. Seasongood: Of course, we haven't had the right to cross-examine or any of the rights of a litigant in the case.

The Court: I understand, but occasionally the Court permits briefs to be filed without actually taking part in the case, but I think that is about as far as we can go."

Not having presented to the District Court the contention that intervention was a matter of right, this Court should not permit appellant to rely now on such contention.

Hornel v. Helvering, 312 U. S. 552, 556-9;

Helvering v. Tex-Penn Oil Co., 300 U. S. 481, 498;

Washington v. U. S., 87 Fed. 2d 421, 435 (C. C. A. 9).

If the claim that intervention was a matter of right, under Rule 24(a), had been asserted as a ground for intervention in the moving papers, or even if it had been made in the extended discussion and argument on the question of intervention in the lower court, National might well have considered the withdrawal of its opposition to intervention, if there appeared to be any merit in the claim. Therefore, it would be seriously prejudicial to the appellee to permit this contention to be raised, for the first time, on appeal.

SECOND

The action of the District Court in denying intervention was correct and involved no abuse of discretion.

The references hereinbefore made (*ante*, pp. 18-19) to the discussions which took place at the hearing between counsel and the court, on the subject of intervention, show that the District Court gave the matter careful and patient consideration and tried repeatedly, but without success, to elicit from appellant's counsel some good reason why intervention should be permitted.

The court obviously was unable to discover that appellant had anything to offer, either by way of evidence or legal argument, having any bearing on the issues, which had not been raised by the Government and thoroughly presented.

The answer filed by the Government specifically raised the point, dwelt on at considerable length in appellant's brief, that the cash-drawer and bookkeeping machines of the Allen-Wales Corporation were a recent development and that, after the war emergency, there would be a wide potential market for such products and they would be in direct and substantial competition with products of National (R. 14). The Government's answer also specifically raised the question of "potential competition" in adding machines between National and Allen-Wales, because of the ability of the former to enter that field without acquiring the stock of the latter and the likelihood that it would do so after the war (R. 14-15).

The Government's answer also asserted that the acquisition sought by National would not be in the public interest because of its effect on "independent" dealers and distributors and on competition in business machines and office equipment "at the distribution level" and, generally, that the acquisition would have the same effect of limiting competition and prospective competition as many of the

practices referred to in the petition filed by the Government in the original anti-trust suit against National, and would not be consistent with the purpose of the final decree entered therein (R.16).

All these points were gone into at great length at the hearing by the attorneys representing the Government, through cross-examination of witnesses and the presentation and discussion of the numerous exhibits, and were strongly urged in argument.

In the record on this appeal, we designated for printing only a small part of the complete record of the proceedings in the District Court, because we did not wish to burden this Court with voluminous exhibits and testimony. They were relevant to the issues in the court below, but would seem to have only a remote bearing on the question of appellant's intervention. It is, therefore, not possible, by reference to this record on appeal, to direct the attention of the Court to the very thorough manner in which every fact was presented which could have any possible bearing on whether the acquisition of Allen-Wales by National would violate, or be inconsistent with, the provisions of the decree or the anti-trust laws. It is believed, however, that the record contains enough material to show that there was a very complete and exhaustive hearing in the District Court on the question under consideration.

The testimony of Mr. Ralph C. Allen, President of the appellant, Allen Calculators, Inc., appears in the record (R. 75-83) and is in itself sufficient to demonstrate that the action of the District Court in denying formal intervention to his company was entirely correct and reasonable and a sound exercise of the court's discretion. This testimony shows that what the appellant was really concerned with was, not that the acquisition of Allen-Wales by National would lessen competition, but that the appellant would have a stronger competitor to meet in the adding machine business. National has never been in the adding machine field, whereas the principal business of both the appellant

and Allen-Wales has been adding machines, so that they are in direct competition with each other. The following excerpt from Mr. Allen's cross-examination is illuminating on this point (R. 82-83):

"Q. Tell us why you are so interested in the fate of the distributors of the Allen-Wales Company.

A. I am not particularly interested in the distributors of the Allen-Wales Company.

Q. What position do you hold in the Allen Calculators? . . . You are president of the company?

A. Yes.

Q. And that is a competitor of Allen-Wales?

A. Very much so.

Q. And if Allen-Wales, by reason of purchase by National Cash, got a wider distribution and stronger backing, it would naturally furnish stronger competition to your company than in the hands of the Allen-Wales Company?

A. Yes—I don't know.

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Q. Aren't you afraid, or isn't your company afraid of National Cash Register Company coming into the adding machine field?

A. I don't know as I am afraid.

Q. You are not glad to hear that they are coming in, are you?

A. I don't know that it excites me particularly.

Q. Well, didn't you have a petition filed here to try to stop it?

A. I think for the good of the independents the deal should be stopped.

Q. It is for the good of the independents you filed this?

A. No, I did not say that. I said I believe that the independents would be benefitted if the deal doesn't go through.

Q. You believe that you would be benefitted too, don't you?

A. I don't admit that. I probably will.

Q. Did you file this petition for the benefit of independents?

A. No. That is for our company."

It also developed, in the course of Mr. Allen's testimony, that he had at one time been president of Allen-Wales and was released from its service and now has a lawsuit pending against one of the stockholders who purchased the business, about stock to which he claimed to be entitled (R. 80-81).

This circumstance may have had some bearing, in the mind of the District Judge, on the question of the real motive for intervention by this single one of eight companies in the adding machine business, and on the court's final conclusion that the public interest and that of the "independents" would be adequately protected by the Government.

If appellant's counsel had any evidence or points of law material to the issues, they had ample opportunity to confer with counsel for the Government before and during the hearing. Before announcing his conclusion that intervention should be denied, the District Judge made certain that Mr. R. C. Allen, President of the appellant, would be called as a witness by the Government (R. 40). He evidently was satisfied that nothing else could be brought out by appellant's counsel which had not been covered fully in the Government's case.

THIRD

Jurisdiction is lacking because the order denying intervention was not appealable.

The proceeding in the District Court was in a suit in equity brought by the United States against the appellee, The National Cash Register Company and others, under the

Sherman Anti-Trust Law (Act of July 2, 1890, ch. 647, as amended). Therefore, under the provisions of the **Expediting Law of February 11, 1903** (U. S. C. A. Title 15, Sec. 29) no appeal can be taken except to the Supreme Court from a final decree of the District Court. An order denying intervention to a person not a party to such a suit, unless intervention is a matter of right, is not a final decree and is not appealable, either to the Supreme Court or to the Circuit Court of Appeals.

United States v. California Cooperative Canneries,
279 U. S. 553;

Missouri-Kansas Pipe Line Co. v. United States,
et al., 108 Fed. (2d) 614; certiorari denied, 309
U. S. 687.

In the *California Canneries* case, the Supreme Court of the District of Columbia had denied leave to California Cooperative Canneries to intervene in a proceeding in that court to vacate a consent decree previously entered in an anti-trust suit commenced by the United States; and Canneries appealed from that order to the Court of Appeals of the District of Columbia, which reversed the order. On certiorari to the Supreme Court, to review an order of the Court of Appeals refusing to set aside its order of reversal, the Supreme Court reversed, holding that the Court of Appeals had no jurisdiction to entertain the order denying intervention. In delivering the opinion of the court, Mr. Justice BRANDEIS said (pp. 558-9):

“ * * * These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act ‘in which the United States is complainant,’ the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins v. Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from

an interlocutory decree. * * * The purpose of Congress to expedite such suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene."

In the *Missouri-Kansas Pipe Line Co.* case, the Circuit Court of Appeals, Third Circuit, dismissed appeals from orders of the District Court of Delaware, denying motions to intervene in proceedings in an anti-trust suit, relying on the decision of the Supreme Court in the *California Cooperative Canneries* case, and this Court denied certiorari (309 U. S. 687).

The appellant cites the decision of this Court in *Missouri-Kansas Pipe Line Co. v. United States* (312 U. S. 502), as establishing a different rule from these cases with respect to the appealability of an order denying intervention. That decision was discussed in an earlier Point in this brief (*ante*, pp. 14-15), where it was pointed out that the decision was based on the rights specifically conferred on the Panhandle Eastern Pipe Line Company by the decree, and on the provision in the decree that it could become a party to the suit for the purpose of enforcing those rights. This Court did not question the general rule that orders denying intervention are not appealable and did not overrule its decisions in the *Canneries* case or in the earlier appeal of *Mokan* from an order denying its application to intervene on its own behalf, in which this court denied certiorari (309 U. S. 687).

The application of the appellant to intervene in this case was within the discretion of the District Court. Therefore, the general rule that orders denying intervention are not appealable applies.

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578, 581.

FOURTH

Some comments on appellant's brief.

I. A considerable part of appellant's brief is devoted to an argument on the merits of the application of National for permission to acquire the stock of Allen-Wales and the correctness of the order of the District Court granting such permission, under certain conditions (See, pp. 28-34).

Only a small portion of the record of proceedings in the court below is contained in the record on this appeal; and it is entirely out of place to argue the merits of the issues presented in those proceedings on this record. The petition which was filed by National (R. 6-12), the answer filed by the Government (R. 14-17), the order of the District Court filed on December 7, 1943 (R. 17-22), together with the opening statement of counsel for National (R. 65-72, 74), and the extracts from the opening statement of the Assistant to the Attorney General (R. 72-4) and his closing argument (R. 85-104) show that all the reasons now suggested by the appellant for denying the petition of National were fully presented and carefully weighed.

It is not true that the attorneys for the Government failed to emphasize the possible interference with "potential" competition as well as the lessening of existing competition (Appellant's Brief, pp. 8-9, 21, 29). It is true, as mentioned in appellant's brief (pp. 7, 29-30), that counsel for National, in the court below, argued that the principal, and practically the only, issue was the effect of the proposed acquisition on competition between the buyer and the seller and that substantial competition between them must be shown to exist. We believe that was and is a correct statement of the law and was not a "narrow" construction either of the anti-trust statutes or the decree. However, the Government took a very different position on the question of competition; and the District Court gave weight to the Government's contention, as shown by the conditions imposed on National in its order.

II. It is implied, in appellant's brief (pp. 4, 13, 16, 29), that National was not asked by the Government or by the court to make any showing that the acquisition by it of the Allen-Wales Corporation would "supplement the plant, patents, machines and facilities of the petitioner" and that this point was raised only by appellant.

As a matter of fact, this was expressly alleged in the petition (R. 11) and was found in the order (R. 19), and a large part of the testimony and physical exhibits introduced by the petitioner were designed to, and did, show how adding machines differed from the products heretofore manufactured and sold by National and how the addition of such machines would supplement its business.

III. In criticizing the Department of Justice for introducing letters from Allen-Wales dealers and distributors, instead of calling them as witnesses or taking their depositions, the appellant implies that the introduction of these letters constituted the entire case presented by the Government (Brief, pp. 6, 22).

That was not the fact. A large amount of evidence was, of course, introduced by the petitioner, since it had the burden of establishing the allegations in its petition. The material which had been gathered by the petitioner and which had been previously submitted to the Department of Justice, included numerous charts and tables, covering the entire field of manufacture and distribution of cash registers, accounting machines, adding machines and other business machines, which the attorneys for the Government, as well as the attorneys for the petitioner, made full use of in presenting all relevant facts and arguments to the court. The attorneys for the Government cross-examined at length the witnesses called by National, who were obviously the persons most familiar with the relevant facts, and also offered numerous exhibits on behalf of the Government, which had been collected and prepared in the course of the Anti-Trust Division's painstaking preparation for the hearing, over a period of several months.

IV. The brief (pp. 12-13) refers to various statements contained in appellant's proposed answer, as though they were facts, though most of them were completely disproved by the evidence adduced at the hearing. Among these is the statement (Brief, p. 12, R. 58) that National plans to withdraw the manufacturing plant of Allen-Wales from Ithaca, N. Y. and incorporate it into its plant at Dayton, thereby disturbing the relationship of some four hundred employees in the Ithaca plant and the course of commerce from New York. Appellant complains that "this direct challenge of the purpose for which Cash was seeking acquisition and the statement of absorption and dislocation do not appear in the answer filed by the Government".

No such statement appeared in the Government's answer, because the Anti-Trust Division knew that it was not true; and the testimony at the hearing established the contrary.

V. Appellant's brief contains a statement (p. 32) supported by nothing except its own assertion in the answer it proposed to file, that no conditions in the order permitting the acquisition of the Allen-Wales Corporation would safeguard "independent dealers", "in view of Cash's great size, practical monopoly, and history of relentless suppression of competition". The brief contains numerous other references to appellee's "past wrongdoings", its size and its "still continuing monopoly" (pp. 15, 22, 30-1).

The final decree in the Government's anti-trust suit against National was entered more than twenty-eight years ago and contained elaborate provisions for the protection of competitors and the public. It required the defendants to pursue a straight and narrow path so far as matters of competition and monopoly were concerned. There is nothing to indicate that National has ever violated the provisions of that decree; and a good conduct record of twenty-eight years entitles it to ask that the charges made against it by the Government in 1911 should not be exhumed today.

VI. The impression is also sought to be conveyed by appellant's brief (pp. 15, 18, 22) that National, in the pro-

ceedings in the District Court, was seeking a "modification" of the final decree of February 1, 1916.

On the contrary, what it was doing was to follow a procedure expressly authorized by the decree in order to acquire, with the permission of the court, the stock of another corporation, for the purpose of supplementing its business and facilities, on a showing that such acquisition would not substantially lessen competition. The prohibition in the decree was not absolute, but was qualified by the provision that permission to make such enjoined acquisitions could be obtained under certain circumstances.

Counsel for the Government argued (R. 38), as does counsel for appellant (p. 16), that the prohibition in the decree goes further than the provisions of the anti-trust laws and requires National to make a showing of the propriety of any desired acquisition, which would not otherwise be necessary. We agree with that contention to the extent that National applied to the court for permission to acquire Allen-Wales only because of the provisions of the decree. There would have been no violation of the anti-trust laws in the acquisition of Allen-Wales by National, in the absence of the decree.

However, we definitely do not agree to the statement in appellant's brief (pp. 31-2) that the burden of proof was on National to show:

"1. The danger from acquisition of competitors guarded against by injunction in the 1916 decree no longer existed, and

2. Under existing conditions it would be a grievous wrong to Cash if it were not permitted to acquire Allen-Wales."

The 1916 decree can be searched in vain for any such requirements.

VII. Appellant's brief (pp. 10-11, 14, 28) refers to, but does not argue at length, the second and third assignments of error, presented on this appeal, namely (2) the with-

drawal by the District Court of leave to the appellant to intervene conditionally, which it had theretofore granted, and (3) its alleged failure to enter an order "in conformity with its decision in refusing leave to intervene" (R. 24).

(a) As to the second assignment of error, unless intervention was a matter of right, the court, in the exercise of its discretion, was not obliged to permit intervention, either conditionally or unconditionally. The court did, in the exercise of its discretion, originally permit "conditional" intervention, which enabled the appellant to take some part in the proceedings on the first day of the hearing. Later on, the court simply ruled that the appellant would not be permitted to intervene. The appellant was certainly put in no worse position by being allowed conditional intervention during part of the hearing than it would have been in had intervention been denied at the outset.

(b) The point of the third assignment of error seems to be that the District Court was under some obligation to state reasons, or rather, a single reason, in its order denying intervention (Brief, pp. 10-11).

The court entered a short order, overruling the motion of the appellant for leave to intervene, without stating any reasons therein (R. 6), having indicated that it did not deem it fair to be confined to a single ground for denying intervention (R. 43). Counsel for the appellee had pointed out that there might be numerous other reasons for such discretionary action (R. 41-2).

The remarks of the learned District Judge on the question of intervention, which appear in the record (R. 30, 32-3, 35-6, 40-3), show that he finally reached the conclusion that intervention should be denied for several reasons, particularly because all possible objections to granting the petition had been fully presented by the Government, which had adequately represented the "independents" and the public interest generally.

and because formal intervention would contribute nothing to the proceeding but might result in undue delay and prejudice the interests, not only of National, but of the sellers of Allen-Wales stock. Those sellers were not parties to the proceeding and were not represented by counsel, although the president of appellant was engaged in private litigation with one of them (R. 80-81).

It is a novel proposition that a formal order of this kind should be reversed merely because it does not state the reasons for making it. Of course, no authorities can be cited for such a proposition; and it is untenable.

FIFTH

The order appealed from should be affirmed or the appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

Washington, March 21, 1944.

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MAY 22 1944

CHARLES ELMORE DODLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1943

No. 592

ALLEN CALCULATORS, INC.,

Appellant,

v.

**THE NATIONAL CASH REGISTER COMPANY and
the UNITED STATES OF AMERICA,**

Appellees.

PETITION FOR REHEARING

**MURRAY SEASONGOOD,
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*Counsel for Petitioner,
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PETITION FOR REHEARING

The principal reasons seeming to us to pervade the Court's opinion ordering dismissal of the appeal (not affirmance of the order of November 16 denying intervention and not affirmance of the findings and order of December 7) are: first, unwillingness of the Court to interpret Rule 24 so as to permit, as matter of right, what might be vexatious and dilatory interventions in anti-trust cases; and, second, so as to make appeals under the Expediting Act to this Court from refusals of intervention, if possible at all, sustainable only in very extreme cases. We have

these practical considerations in mind, but petition for a rehearing in the hope of showing as a complement:

(a) Rule 24 is to be liberally not narrowly construed; where as here the United States supports a proposed intervention and aid of the proposed intervenor for its special knowledge and interest, danger of vexatious interference and delay is slight and the advantage of full presentation of industrial and economic problems involved is great; in cases where an applicant's rights will be lost if he is not permitted to intervene, he should be permitted, under proper conditions, which the Court can easily require and control, to intervene;

(b) new, and from the course of the proceedings, to counsel wholly unexpected, procedure governing appeals under the Expediting Act from refusals of intervention should be established only after utmost exploration of consequences of the new procedural requirements, and if counsel are given opportunity to argue against the new procedure being applied in the pending appeal, or to supply additional parts of the record and furnish argument upon a completed record;

(c) there are certain assumptions in the Court's opinion which reargument would seek to disprove; and

(d) a result that an offender against the anti-trust laws should, by modification of a consent decree, acquire stock of a competing corporation in contravention of decisions of this Court is not desirable and should not eventuate owing to a procedural lacuna.

Hence, petition for rehearing is requested because the Court's opinion:

(1) assumes (mistakenly, we feel, with great respect, can be shown) that Allen¹ is not bound by the District Court's decree;

¹ Allen Calculators, Inc., will be referred to as "Allen"; Allen-Wales Adding Machine Corporation as "Allen-Wales"; National Cash Register Company as "Cash."

(2) treats the application to intervene here involved as if the attempt had been (as it was not) to intervene while the original petition for injunction for violation of the anti-trust laws brought by the United States was pending—a very vital difference according to *United States v. Swift & Co.*, 286 U. S. 106;

(3) interprets Rule 24 as, in this particular instance, narrowing the grounds of permissible intervention;

(4) decides an appeal under the Expediting Act from an order refusing intervention taken or substantially taken before decree on the merits of petition for modification of a consent anti-trust decree, is taken from such latter decree; requires, to prevent affirmance, full printing of the record relating to such merits decree and affords no opportunity to appellant to supply the omission;

(5) permits lifting the injunction in an anti-trust decree so as to allow the offender to acquire stock of a competing company in contravention of law established by binding decisions of this Court.

(1) Requested reconsideration of statement in opinion Allen is not bound by decree.

As to (1), the opinion, after quoting Rule 24, says, in connection with paragraph (a) of that rule, relating to intervention of right (p. 3):

“The application did not fall under (2) for the appellant clearly would not be bound by any judgment in the action.”

But, in the first place, under Rule 24(a)(2) a proposed intervénor of right need not show it “would be bound by a judgment in the action,” but only it “may be bound by a judgment in the action.” In the second place, the opinion, besides summarizing Rule 24(a)(2) in a materially different respect from the way it reads, does not attempt to show why Allen is not bound by the judgment.

There is no factual refutation or showing of the inapplicability or incorrectness of numerous decisions of this Court that, when a court has entered a decree and reserved jurisdiction to modify the decree, no other court can or will attempt to assume jurisdiction respecting the same matter, either before or after modification. The law, we submit with deference, is invariably to the contrary of the Court's above statement that Allen is not bound by what has happened and the contrary is required by principles of comity, orderly procedure and to avoid unseemly conflicts of jurisdiction.² In the third place, Section 16 of the Clayton Act allows

"Any person . . . corporation to . . . have injunctive relief . . . against threatened loss or damage by a violation of the anti-trust laws, . . ."

Certainly,⁴ it was not inappropriate for Allen to ask to intervene in opposition to the proceeding looking to the modification of a decree entered for its protection in the court which passed the decree. No one denies the court might have permitted Allen to intervene. Surely, then, it is not intended by the opinion to declare Allen may still have recourse under the decree of 1916 or under Section 16 in another United States Court, to make the United States and Cash parties to a new suit and enjoin what the court below has permitted. It is a practical certainty no other Court would tolerate such an attempt. Section 16 of the Clayton Act clearly allows injunctive relief only against "threatened loss," not loss that has resulted from an executed transaction. *Fleitman v. Welsbach Street Lighting Co.*, 240 U. S. 27 (1916).

² As a recent example only, *Miller v. Court of Common Pleas of Cuyahoga County*, 143 O. S. 68, decided March 22, 1944.

³ Cited more fully in brief of appellant opposing motion to dismiss or affirm, p. 8.

⁴ Opinion, p. 3, beginning last paragraph.

So, if the Court adheres to its decision, Allen, we cannot help but feel, as to any rights under Section 16 of the Clayton Act or under the decree, not only "may be bound by a judgment," but "will be bound by a judgment in the action."

(2) Intervention below sought not in aid of or to oppose anti-trust injunction petition, but to oppose modification of consent decree granting injunction.

As to (2), the opinion (p. 3), referring to Section 16 of the Clayton Act, says:

"It grants no privilege, much less an unconditional right, to intervene in suits under the Sherman Act brought by the United States."

But, the proceeding, in which Allen sought to intervene, was no longer a suit pending before judgment. The injunction suit had been brought and a final consent decree in favor of the United States had been entered in 1916. The suit had been merged in a judgment. Allen had no right to sue under Section 16 while that judgment was in effect, because all relief Allen could obtain under Section 16 had been gained for it by the United States. Intervention was sought by Allen to oppose a recent petition by Cash, the offending party, to modify the decree—an ancillary, but substantially a new proceeding by Cash. There is a most important difference between attempt to intervene in such a case and in an original proceeding by the United States. *United States v. Swift & Co.*, 286 U. S. 106, 119, says of the former:

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. . . . Nothing less than a clear show-

ing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

But, even if intervention had been sought before the original petition for injunction had proceeded to decree, the United States should pretty well know whether intervention would be helpful or likely to hamper enforcement of the anti-trust laws. Opposition of the Government would be entitled to great weight when intervention is discretionary. Likewise, if intervention is discretionary, the request of the United States as made here that intervention should be granted, should have been given almost conclusive weight by the trial court. It should at least have been considered, but it was not.

The effect of the Court's decision in this case appears to establish a precedent that intervention of a competitor is discretionary in a proceeding by the guilty party to obtain modification of a consent anti-trust decree against it, and opposition of the offender to intervention, although the United States desires it, may be allowed to prevail without applicant having possibility of appeal.

(3) The opinion interprets Rule 24 as restricting rather than amplifying previous law relating to interventions.

As to (3), before the Rules of Civil Procedure were adopted, the right of intervention in the federal courts was well established where refusal of intervention to an applicant, having a special interest to protect, would amount, as here, to a practical denial of relief to applicant. *United States v. California Canneries*, 279 U. S. 553, decided in 1929, before the Rules of Civil Procedure were adopted, is not to the contrary and surely not where the applicant "may be bound by a judgment in the action"

in which he is not allowed to intervene. (We are speaking now of right to intervene and not of appealability under the Expediting Act of refusal to intervene.) The language of the *Canneries* opinion was (p. 556), concerning the Court of Appeals:

"It did not refer to the decisions which hold that an order denying leave to intervene is not appealable . . . except. . . ."

The ratio is that refusals of leave to intervene are ordinarily interlocutory orders because not preventing the applicant from having relief elsewhere. The cases cited in the *Canneries* opinion (p. 556) bear this out. Thus, in *Swift v. Black Panther Oil & Gas Co.*, 244 Fed. 20 (8 Cir.), opinion by Sanborn, J., it is said (p. 30):

"In intervention there are two classes of cases—one class in which the intervention is not indispensable to the preservation or enforcement of the claim of the petitioner, and there the permission to intervene is discretionary with the court; another class in which . . . his interest therein can be established, preserved, or enforced in no other way than by the determination and action of that court. The petitioner, who has a claim of the latter class, has an absolute right to intervene . . . , permission for him to intervene is not discretionary with the court, and he may review by appeal an order refusing that right."

citing decisions including *Credits Commutation Co. v. United States*, 177 U. S. 311.

We have urged that when the decree of 1916 forbade Cash to acquire stock of a competitor subject to right in Cash to petition for permission to acquire in a particular case, the stock of all competitors, *so far as relates to acquisition thereof by Cash*, was in the exclusive jurisdiction and, therefore, in the constructive custody of the court.

passing the decree. The Court has disallowed that contention and we do not purpose attempting to re-argue it. However, we make the point that intervention of right was permitted in cases relating to a *res*, not because they were *res* cases, but because the rights of the proposed intervenor would be lost in that class of cases, as an example, if the intervenor were not permitted to come in and assert its right in the court having custody, actual or constructive, of the *res*. The basis of allowance of intervention of right is that it exists wherever the proposed intervenor's claim will be lost if intervention is refused. If we are correct in thinking Allen's right to prevent acquisition is now lost, then intervention would have been as of right in the only court that could have saved Allen's rights.

In *Credits Commutation Co. v. United States*, *supra*, the opinion quotes (pp. 315-16) from and approves another opinion of Judge Sanborn, as follows:

"When such an action is taken, that is to say, when leave to intervene in an equity case is asked and refused, the rule, so far as we are aware, is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, *but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding*. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court. . . . It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. . . . In such cases an order denying leave to intervene is not discretionary . . . , and will generally furnish the basis for an appeal, *since it finally disposes of the intervenor's claim by denying him all right to relief*." (Italics ours.)

This quotation shows that fund in court cases are illustrative, not exclusive of the instances in which intervention is a matter of right and the real test is: whether the proposed intervenor's rights will be lost if he is not allowed to intervene. In *City of New York v. New York Telephone Co.*, 261 U. S. 312, 316 (1923), the opinion, after citing *Credits Commutation Co. v. United States* and other decisions, adds (p. 317):

"These cases show that exceptional circumstances may make an order denying intervention in a suit a final and appealable order, . . ."

What was really decided in *United States v. California Canneries, supra*, was, under the Expediting Act, there was no appeal to the Court of Appeals from refusal of intervention. Yet the only appeal taken was to that court: when it was decided appeal had been to the wrong court, that ended the matter. Another ground for disposing of the case was that the intervention was sought but not allowed "for the purpose of impeaching a decree already made," citing numerous cases. The opinion did not decide that if one is entitled to intervene of right or there is abuse of discretion, denying leave to intervene is not a final decree as to the applicant. This is manifest from *Missouri-Kansas Pipe Line Co. v. United States*, 312 U. S. 502, of which this Court in the present opinion says, in effect, that when the proposed intervenor there was entitled to intervene as of right and was denied intervention "the action was final" (p. 3). As this Court entertained the appeal in that case, it must have been on the proposition that refusal of intervention even in a non-*res* case may be a final order. In *Chrysler Corp. v. United States*, 316 U. S. 556, also decided after *Credits Commutation Co. v. United States*, modification of a consent anti-trust decree was regarded (p. 562), citing the Expediting Statutes,

as a final, appealable order. The "final decree" in the Expediting Act is no different from the "final decision" in the statute relating to appeals to a Circuit Court of Appeals. (Jud. Code, Sec. 128, *Reeves v. Beardall*, 316 U. S. 283.)

(4) New procedure prescribed by opinion under Expediting Act in appeals from refusal of intervention.

As to (4), the last paragraph of the opinion (p. 4) indicates that the appeal here, although sought from the order of November 16 refusing intervention, was really from the findings and order allowing acquisition entered December 7 (R. 17) and must be dismissed, since not enough of the record is printed to show abuse of discretion in entering such findings and order.

In taking the appeal from the order of November 16 refusing intervention, Allen thought it was employing customary and required procedure. Allen followed *Missouri-Kansas Pipe Line Co. v. United States*, *supra*, where the appeal was from the refusal of leave to intervene. Allen's petition for appeal was filed December 4. The assignments of error filed with it (R. 23-4) on December 4, assigned error only regarding the order of November 16 as refusing and withdrawing leave to intervene and refusing to enter in that order the reason for refusal. The jurisdictional statement also filed December 4 did not and could not refer to any prospective findings and order. Allen, when it took its appeal so far as it could on December 4, did not know any findings or order were to be entered, much less when, or what they might contain.

Rule 72 of the Rules of Civil Procedure, relating to appeal from the District Court to this Court, reads:

"When an appeal is permitted by law from a district court . . . , an appeal shall be taken by petition for appeal accompanied by an assignment of errors.

The appeal shall be allowed; a citation issued, a jurisdictional statement filed, a bond on appeal and supersedeas bond taken, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal."

Before this rule was adopted, an appeal was "taken" before bond was given and a citation was unnecessary when appeal was taken in open court at the same term decree was rendered. *Brown v. McConnell*, 124 U. S. 489.

If the present appeal was not "taken" under this Rule by filing on December 4 petition for appeal, assignment of errors and jurisdictional statement, and something further remained to complete the appeal, that was not because of Allen's wish to defer complete appeal; but because the Court requested postponement to December 6 and again on that date to December 10. The jurisdictional statement contained in the printed pamphlet, "Statement As To Jurisdiction" (p. 1h), shows:

"The petition for appeal was filed on December 4, 1943, and is presented to the District Court herewith, to-wit, on the 4th day of December, 1943."

and the Supplemental Jurisdictional Statement filed December 10 shows (id. p. 13):

"On presentation to the Court by Allen Calculators, Inc. on December 6, 1943, of its appeal papers filed December 4, 1943, and of a form of bond for costs on appeal, presentation of same having been postponed to that date at the request of the Court, and counsel for Allen Calculators, Inc. having requested the Court to fix the penalty of said bond for costs in a sum approximately two hundred and fifty dollars (\$250.00), the Court continued the hearing of the petition for appeal until December 10, 1943."

The reason for Allen printing the findings and order of December 7, 1943, as an Appendix B of its supplemental jurisdictional statement was not to undertake an appeal therefrom, but to show what had happened since it had appealed, as far as possible, on December 4 and 6 and to forestall motion to dismiss or affirm (later actually made) on the ground the case had become moot. The findings and order of December 7 had nothing to do, in Allen's opinion, with the extent or validity of its appeal either taken on December 4; or at least taken as far as it was possible to take the appeal on that date and on December 6. If the Court, following appeal from refusal of leave to intervene, had denied Cash's petition, that would not have invalidated Allen's previous appeal from the order of November 16 denying intervention. Allen's appeal would have been dismissed by this Court, not because a valid appeal from the order refusing intervention was dependent on or related to a later decree, but because the appeal, conceding it to have been well taken, had become moot. As we understand it, when a case becomes moot, the original appeal is not rendered faulty; it is assumed to have been well taken; but the dismissal is because the Court does not decide a controversy that has become only academic. If Allen had taken a perfectly good appeal and the case had later become moot, its appeal would have been dismissed. But the appeal would not be invalidated by the later order or event rendering the case moot.

The statement by appellant of points (R. 106) includes:

"IV. The Case Is Not Moot."

Rule 75(d) of the Rules of Civil Procedure requires a statement of points:

"If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action. . . ."

Allen, in its appeal, sought to comply fully with all applicable rules and particularly with Rule 75(e):

"RECORD TO BE ABBREVIATED. All matter not essential to the decision of the questions presented by the appeal shall be omitted. . . . For any infraction of this rule . . . the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties."

The Court's opinion, p. 4, says that an appeal under the Expediting Act from a refusal of intervention to oppose modification, requested by the offender, of an anti-trust consent decree, must be treated as taken from the final later decree on the merits of the petition for modification. With the greatest deference, we ask the Court to reconsider this pronouncement and submit, as one reason, that under previous decisions of the Court no one may appeal from a decree entered in a cause in which he is not a party. *Ex Parte Leaf Tobacco Board of Trade v. City of New York*, 222 U. S. 578, 581:

"1. One who is not a party to a record and judgment is not entitled to appeal therefrom. *Bayard v. Lombard*, 9 How. 530; *Indiana v. Liverpool, London & Globe Ins. Co.*, 109 U. S. 168; *Ex parte Coekroft*, 104 U. S. 578."

We respectfully ask the Court to allow Allen further argument in an effort to convince the Court that the present decision introduces new and onerous conditions respecting appeals from denials of intervention. The Court does not mean, we feel confident, to indicate that there cannot be an appeal, where intervention is a matter of right, or even where there is an abuse of discretion, because of the Expediting Act. Accordingly, if the Court's opinion is ad-

hered to, appellants will have the large burden and expense of submitting, and the Court the added labor of examining, entire, often voluminous records in cases where intervention has been refused. Practitioners, out of abundant caution, when appealing in any case from refusals of leave to intervene, will often print the entire record of all proceedings in the case.

In this appeal, everything relating to the application to intervene, the tentative allowance of intervention, the final denial of intervention and the refusal to enter a decree showing that the sole ground for refusing intervention was due only to a mistaken view of the law are included in the record, are printed and are before the Court. There is not a speck of anything relating to these matters below which opponents can point out is not before the Court.

The opinion concludes (last par. p. 4), treating the appeal as from the decree on the merits of Cash's petition for modification, that the Court would

"have to affirm the judgment" (not dismiss the appeal) "since it is not shown that the District Court abused its discretion in denying intervention."

But, may we not still ask the Court to reconsider if, on this record, abuse of discretion or the equivalent plain error of law does not appear, when a trial court:

(1) refuses intervention solely because of a mistaken view of the law that none but the original parties in a suit can become parties, when the offender against whom there is a consent decree, petitions for relief from the decree, and the other party, the United States, supports, as helpful, the application to intervene of a competitor protected by the decree and having special knowledge of the problems involved;

(2) grants conditional intervention, promises opportunity for citation of authorities and, without hearing these

authorities and in spite of them, revokes the allowance of tentative intervention for no reason except such mistaken view of the law;

(3) if the matter is discretionary, does not, as required by Rule 24(b), last sentence:

“consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

particularly when the United States says it will not. As stated in *Carbide & Carbon Chemicals Corp. v. United States Industrial Chemicals, Inc.*, 140 Fed. 2nd 47, 50 (4 Cir.), discretion “‘is a judicial discretion and must find its basis in good reason’ and is subject to appellate review in proper cases.”

However, all this aside, and assuming, as this Court does, Allen’s appeal is to be treated as taken from the findings and order of December 7, error in that order requiring reversal clearly appears from the record here. Section 7 of the Clayton Act, c. 323, 38 Stat. 730, 731 (U. S. C., Title 15, Sec. 18), forbids a corporation to acquire stock of another corporation

“where the effect of such acquisition may be” (not “is”) “to substantially lessen competition”

between the buyer and seller; or will

“tend to create” (not necessarily “creates”) “a monopoly of any line of commerce.”

There is no finding in the order of December 7 that the acquisition by Cash of Allen-Wales “may not substantially lessen competition” in the future or will not “tend to create a monopoly”. The record is replete with instances where counsel for Cash pressed on the Court and the Court adopted, the erroneous view, suppression of present sub-

stantial competition would be the only cause for a denial of the petition. This is all the more plainly erroneous when the record shows, without dispute, that the competition between Cash and Allen-Wales in respect to cash drawers and registers had just begun and Allen-Wales's potential competition was great.

Findings 1 to 8 (R. 18-19) certainly do not support the decree or satisfy the requirements of *United States v. Swift & Co.*, 286 U. S. 106, as to what must appear in order to justify modification of consent decrees in anti-trust cases on petition of the offender. Thus, there is no finding of the *Swift* case requisites (pp. 117-119):

(a) That Cash's overwhelming size, past aggressions and oppressive monopoly which existed in 1916 do not still exist. (No such finding could be made because the record shows Cash's present enormous size and substantial monopoly of the field.)

("The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow." p. 119)

(b) That it would be a grievous wrong to Cash not to permit acquisition. (Here, again, no such finding could possibly have been made, because this is not pleaded by Cash in its petition and the utmost that was ever suggested for Cash in support of its petition for leave to acquire was that acquisition would be a convenience. It was not even suggested acquisition was a necessity or that refusal of permission to acquire would be a grievous hardship.)

(c) That there must be a "clear showing" of (a) and (b).

Where the findings in a decree are deficient as not including essential elements and are insufficient in law to support what is ordered and, on the contrary, show that, according to decisions of this Court, such as *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 356-7;

United States v. Socony-Vacuum Oil Co., Inc., 310 U. S. 150, 224; *Fashion Guild v. Federal Trade Commission*, 312 U. S. 457, 466, the exact opposite should have been ordered, and enough appears from the record to show that the beneficiary of the decree could not and made no effort to show by evidence, clear or otherwise, matters necessary for essential findings if the order is to be sustained (namely, decrease of size and monopoly and grievous wrong from refusal of its application), printing the whole record would not high light the already glaring error apparent from the findings and order in the failure of the findings, as matter of law, to justify the order.

The opinion says (p. 4):

"The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown; and it is not ordinarily possible to determine that question except in the light of the whole record."

Assuming, as the Court does, the whole record on Cash's petition should have been brought to this Court, the appeal, we suggest, need not be dismissed. Suppose it had been decided Allen was entitled to intervene as matter of right and yet intervention had been refused. We do not understand that an appeal could not have been taken under the Expediting Act, or that it would have been necessary, in order to secure reversal, to include more of the record than clearly showed the right and the denial of it. Must one then judge, at his peril, regarding the "refinements," *Securities Commission v. United States Realty Co.*, 310 U. S. 434, 458, of whether an intervention is of right or permissive under Rule 24? That case (p. 459) held Rule 24(2):

"plainly dispenses with any requirements that the intervenor shall have a direct or pecuniary interest in the subject of the litigation."

This Court has the power, instead of directing the appeal be dismissed, to require that the whole record, thought by it to be revelant, be certified and sent to it, so it may determine whether the issues were thoroughly explored and the parties were adequately represented. Even if they were, there might still have been an abuse of discretion.

If the Court, on consideration of what we are suggesting in this petition, is still of opinion the whole record should be produced, Allen, we think, should be given opportunity (because we know of no opinion of this Court putting Allen on notice that the failure to print the entire record was inexcusable) to assume the labor and expense of printing what the Court thinks should be supplied.

We feel bound to asseverate, however, the data presented to the court below were meager and did not comprehend the real issue before it. The data, presented almost entirely by Cash through charts prepared by it and its own witnesses,⁵ were confined to showing no substantial direct competition between Cash and Allen-Wales. While the data had apparently been submitted to the Government for checking, no adequate check was made by persons familiar with the facts and figures. This is apparent when inaccuracies in these figures were called to the attention of the court by Allen and went uncorrected because it was not allowed to intervene (R. 36b, 35). It is not much comfort that the president of Allen was permitted to testify, when his own counsel was not permitted to question him and develop matters set forth in the proposed answer attached to the intervening petition. Among these bearing on the real issue which would have been brought out by Mr. Allen through questioning of his counsel are:

(1) The basic principles underlying the cash register, the adding machine and other similar registering devices are substantially the same, and the mechanical concept and

⁵ Supplemented by salesmen demonstrations of machines, not in the record, at all.

engineering required for these types of machines are measurably interchangeable, so that there was no purpose in permitting Cash to acquire an adding machine company for the purpose of supplementing its line. (See paragraphs 3 and 4 of intervenor's proposed answer. R. 56-7.)

(2) Cash still exercises predominant control in the registering device field, and nothing has happened to break its throttle-hold. (See paragraph 5 of intervenor's proposed answer. R. 57.)

(3) It is only by virtue of building strength without interference from Cash, in lines such as adding machines, that other manufacturers have been able gradually to attempt to shift into the cash register field dominated by Cash. This shift has been necessarily gradual, because, in the first place, the independents have had to build competitive strength in the way of financial condition, and in the way of distributive outlets before they could venture into direct competition with Cash on cash registers. It is exactly in that way that the independents have been able to develop and put on the market the cash drawer combination which has had a very appreciable success although only recently put on the market. Cash not only directly adds to its monopoly by taking away the cash drawer business developed by Allen-Wales, but indirectly fortifies its monopolistic position by eliminating a substantial part of the adding machine business which is the means by which independents have been enabled to build up strength with which to compete with Cash in the cash register field. (See paragraphs 8 through 13 of intervenor's proposed answer. R. 59-60.)

(4) The effect upon the dealer organization of permitting Cash to take over Allen-Wales is not limited to the direct result of this acquisition upon the dealers themselves, but embraces also the serious results to those independent

manufacturers in the registering device field, who must depend upon dealer organization not only for the sale of products now manufactured, but also for the sale of cash registers on any basis competitive with that of Cash. While this was presented in an informal way by the Government from the standpoint of the dealers, there was no presentation of its effect upon the independent manufacturers who are the only actual or potential competitors of Cash in the registering device field.

The order of December 7, while it purports to give some measure of protection to the dealers, utterly fails to protect the independent manufacturer in connection with dealer distribution. In fact, all the order purports to do is give Allen-Wales dealers a short breathing space in which they can turn to some other line of business, and even with respect to this short space, the protection is very insecure. (Paragraphs 14 through 21 of intervenor's proposed answer. R. 61-63.)

Although all the above matters were set forth in intervenor's proposed answer and all were important on the real issue before the court, no data or evidence was presented concerning these matters by Cash or the Government, and Allen was denied the right to present evidence or data because not permitted to intervene. Therefore, we ask a reconsideration of that part of the opinion which (p. 4) says the issues properly before the court were thoroughly explored. The court went into the case on a very narrow basis and on an erroneous view of the law, and even with respect to that basis available data and evidence were inadequately presented.

Not only was there failure to permit production of all available data upon the issues of the case, but there was a failure to permit adequate representation by those parties who had a direct interest in the matter before the court.

If we assume that the Government took an adversary position in the proceeding (as the opinion requires, contrary to our previous thought), the Government did not take up the cudgels for the independent manufacturer. That it was not doing so and did not intend to do so is fully apparent not only from the record itself, but also from its having invited intervention by Allen to present the facts to the court from the standpoint of its interest in the proceeding and that it did not appeal. Even before Mr. Allen was called to the stand, the Government had clearly indicated it preferred to have him examined by his own counsel and would only call him as a witness as a last resort in case the court refused to permit Mr. Allen to be so examined. (R. 40 top.)

Furthermore, although the Government did talk up for the dealers and present some data with respect to their situation in an informal manner, the purported representation of this group by the Government failed completely, as can be demonstrated from a reading of the order of December 7, 1943, and the provisions of that order designed to protect the dealers. Although the court found (paragraph 7 of the order R. 19 top) that the preservation of the independent dealers as competitors in the field of distribution of business machines is a matter of public interest, it then went ahead and made an order which, in effect, gives them only a five-year lease of life. This was done without a showing by the Government, or any representative of the dealers of the effect such an order would have on the continued existence of these dealers. In the absence of some showing, the only conclusion that can be drawn from the order itself is that the existence of the Allen-Wales dealers will at best be short-lived, and that instead of being preserved as actual and potential distributors, they are in fact being destroyed by order of the court and under guise of its protection. Both of the premises

upon which the opinion bases its conclusion fail, we most respectfully submit, because there was neither full exploration of the issues nor adequate representation of the persons whose interests were directly affected by the order to be made.

It would seem that in any case where the interests of certain groups of the public are involved and the Government does not assume to have the facilities or facts necessary to represent these interests fully, the intervention by one representative of each of these groups, such as the grocers' association in the *Swift* case, especially if requested by the Government, should be permitted as matter of sound policy and discretion. That would not lead to mob intervention. In fact, the same situation occurs for example, frequently in reorganizations under Chapter X of the Bankruptcy Act, where the court permits the intervention of committees or other representatives of various groups of creditors although the interests of all creditors are also represented by the bankruptcy trustees and the Securities and Exchange Commission; but if more than a representative of a group seeks to intervene, the court has frequently denied such second application on the ground that the group is already adequately represented. It would seem the same practice ought to be adopted in anti-trust cases, and where no group has any representative to present the facts from the standpoint of that group, it ought to be abuse of discretion not to allow one representative to intervene and be fully heard.

(5) Unfortunate result if erroneous modification and permitted acquisition are sanctioned.

According to *United States v. Swift & Co.*, 286 U. S. 406, and subsequent decisions, *supra*, pp. 16-17, and Section 7 of the Clayton Act, *supra*, p. 15, the petition of Cash to lift the injunction against it in the consent anti-trust decree

of 1916 so as to permit acquisition of the stock of Allen-Wales, a growing competitor, should have been denied. But, if the opinion of this Court is adhered to, the error becomes irretrievable: the Government has not appealed and Allen cannot. If the decision below is wrong in law and prejudicially erroneous, a result of permitting it to stand because of procedural insufficiencies should, be reached only because unavoidable.

"Rules of Practice and procedure are devised to promote the ends of justice, not to defeat them. . . . Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel v. Helvering, Commissioner*, 312 U. S. 552, 557.

If the Court will re-read this record, it will find no reference to the *Swift* case except a breathless reference to it solely as authority for permitting intervention (R. 33) by counsel for Allen. Such counsel had no further opportunity to refer to the case. Its binding authority prescribing requisites for modification of consent anti-trust decrees was not adverted to by anyone. The full argument for the Government appears in the record (R. 85-104). The admonitions of the *Swift* case that a consent anti-trust decree is not to be modified at the instance of the offender except upon its clearly satisfying certain conditions precedent, were not presented to the trial court. They did not enter into the Court's consideration of the petition. Certainly, counsel for Cash did not plead, advert to or seek to meet the conditions of the *Swift* case. They repeated, time and again, the sole issue was whether there was substantial competition between Allen-Wales and Cash, as if this were an original proceeding having no relation to the previous consent decree. The Court accepted this and thought the whole matter governed by *International Shoe Co. v. Federal Trade Commission*, 280 U. S. 291 [(R. 89), and other interpellations by the Court during

argument for United States (B. 85-104)], which had nothing to do with modification of a consent decree.

The right to intervene is valuable, not alone to present the applicant's position to the trial court, and not alone so applicant may cross examine, within reason, the party seeking relief which applicant opposes, but also for appeal from an erroneous decree when the parties to the suit do not choose to appeal, no matter how wrong in law the decree may be. Of the suggestion there may be vexatious and dilatory appeals, it may be observed the sixty day limitation, the motion to dismiss or affirm, the summary docket and the power to advance and to assess costs, where appeals are frivolous, are ready deterrents. The counter disadvantage of an erroneous decree being allowed to stand, in a matter of public importance, because the parties do not choose to appeal, weighs heavily in favor of permitting and controlling intervenor's appeals to redress a public wrong, if the matter of appeal is at all open. We have tried to follow Rule 33 and to make this petition for rehearing as brief and distinct as adequate statement of grounds permits.

Respectfully submitted,

MURRAY SEASONGOOD,
FRANK R. BRUCE,
*Counsel for Petitioner,
Allen Calculators, Inc.*

We, Murray Seasongood and Frank R. Bruce, counsel for Petitioner, Allen Calculators, Inc., certify that the above petition for rehearing is presented in good faith and not for delay.

MURRAY SEASONGOOD,
FRANK R. BRUCE,
Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 592.—OCTOBER TERM, 1943.

Allen Calculators, Inc., Appellant,	}	Appeal from the District Court of the United States for the Southern District of Ohio.
vs.		
The National Cash Register Co. and the United States of America.		

[May 1, 1944.]

Mr. Justice ROBERTS delivered the opinion of the Court.

By a decree, entered February 1, 1916, in a suit by the United States against National Cash Register Company, the latter was restrained, pursuant to the antitrust statutes, from acquiring ownership or control of the business or plant of a competitor manufacturing or selling cash registers or other registering devices. The injunction, however, provided that, in case National should desire such acquisition,

"a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right."

National, desiring to acquire stock of Allen-Wales Adding Machine Corporation, petitioned for leave and gave the required notice to the Attorney General. The Government filed an answer opposing the grant. The matter was set for hearing in the District Court November 15, 1943. On that day Allen Calculators, Inc., the appellant, presented a motion for leave to intervene. The United States consented to the proposed intervention; National opposed it. The District Judge granted intervention conditionally and allowed counsel for the appellant to make an opening statement and to take some part in the proceedings. Subsequently, but prior to the closing of the hearing, he ruled

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that the appellant would not be allowed to intervene. Before making his ruling, he was advised, in answer to his inquiry, that the president of the appellant would be called as a witness by the Government. November 16 he entered a formal order denying intervention.

The issues, which were tried upon evidence submitted by National and by the Government, were whether the purported acquisition would eliminate competition between certain products of National and Allen-Wales, would eliminate potential competition between other products of the two companies, and would, in other respects, be contrary to the purpose of the original decree. The proceeding was adversary throughout.

December 4 the appellant filed its petition for appeal from the order denying intervention. December 7 the District Judge entered findings of fact and an order granting National's petition upon certain conditions which he deemed necessary to insure compliance with the original decree in the suit. Neither party has appealed from that order. December 10 the Judge allowed this appeal with a proviso that allowance should not operate as a stay of the order granting National's petition. The appeal is to this court under the Expediting Act.¹

Rule 24 of the Rules of Civil Procedure² is:

"(a) *Intervention of Right.*—Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

"(b) *Permissive Intervention.*—Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

¹ Act of Feb. 11, 1903, c. 544, § 2, 32 Stat. 823, as amended March 3, 1911, c. 231, § 291, 36 Stat. 1167, 15 U. S. C. § 29. Cf. Act of Feb. 13, 1925, c. 229, § 1, 43 Stat. 938, 28 U. S. C. § 345.

² 28 U. S. C. A., following § 723c.

The appellant insists that it was entitled to intervene as of right, but we think that, in the light of the express provisions of clause (a) the contention must be rejected. No statute of the United States confers an unconditional right of intervention, as required by (1). The appellant relies on § 16 of the Clayton Act,³ but that section merely authorizes private parties to sue for relief against threatened damage consequent upon the violation of the antitrust laws. It grants no privilege, much less an unconditional right, to intervene in suits under the Sherman Act brought by the United States. The application did not fall under (2) for the appellant clearly would not be bound by any judgment in the action. Nor had it any interest in the distribution or disposition of property in the custody of the court so as to come under (3).

The appellant relies upon *Missouri-Kansas Pipeline Co. v. United States*, 312 U. S. 502. That case, however, is to be distinguished. There the applicant on whose behalf intervention was asked was named in the original decree as one who should be heard in respect of its property rights in the event certain action was taken. Such action was taken and, despite the terms of the original decree, intervention was denied. Clearly, as to the intervenor, the action was final. We accordingly entertained the appeal.

The appellant had standing to invoke the discretion of the district judge to permit it to intervene under (b)(2) on the ground that its "claim or defense and the main action have a question of law or fact in common." The rule provides that, in exercising discretion as to intervention of this character, the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. It is common knowledge that, where a suit is of large public interest, the members of the public often desire to present their views to the court in support of the claim or the defense. To permit a multitude of such interventions may result in accumulating proofs and arguments without assisting the court. The record here discloses that the parties produced all data they and the court thought was available upon the issues in the case. Moreover, the court invited the Government to call the appellant's president to testify as to his knowledge concerning the issues.

³ 15 U. S. C. § 26.

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The challenged order is but an order in the cause and not the final judgment. The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown; and it is not ordinarily possible to determine that question except in the light of the whole record. If, in this case, National's petition had ultimately been dismissed, a review of the court's denial of appellant's intervention would have been an idle gesture. Where, as here, examination of the entire record leading to the court's final order discloses that the issues were thoroughly explored and that the parties were adequately represented, the action of the court denying intervention should not be reviewed. It was, *inter alia*, to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust acts, that jurisdiction to review District Court decrees was not vested in the Circuit Courts of Appeals but solely in this court, and that the statute limited the right of appeal to final decrees.⁴

The record shows that the District Court had entered a final decree on the merits of National's petition prior to allowing the present appeal; and, if we treat the appeal as taken from that final decree, as we think is required by the Expediting Act,⁵ and as attacking that decree because the appellant had been wrongfully denied intervention, we should have to affirm the judgment since it is not shown that the District Court abused its discretion in denying intervention.⁶

The appeal is dismissed.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY dissent.

⁴ *United States v. California Canneries*, 279 U. S. 553.

⁵ *United States v. California Canneries*, *supra*.

⁶ *Id.*, cases cited p. 556.